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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VIRGIN ISLANDS,
Petitioner,

v.

DONALD T. REGAN,
Secretary of the Treasury,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Where Congress has provided in section 28 of the Revised Organic Act of the Virgin Islands, 68 Stat. 497 [1954 Act], for a rebate to the Virgin Islands of certain taxes, duties and other federal revenues in order to fund necessary governmental projects and services:

(1) whether the "proceeds of customs duties," which must be covered into the treasury of the Virgin Islands under section 28(a) of the 1954 Act, are limited to the nominal customs duties imposed by the Virgin Islands upon foreign goods entering the Islands, as the court below found, or also include the substantial U.S. customs duties on goods produced in the Islands and shipped to the mainland, as the District Court held; and

(2) whether the proceeds from "all taxes imposed by, and collected during the fiscal year under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States," which must be transferred to the Virgin Islands under section 28(b) of the 1954 Act, include the federal excise tax imposed upon gasoline refined in the Virgin Islands and shipped to the mainland for sale, as the District Court also decided but the court below denied.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Virgin Islands, an unincorporated territory of the United States, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on October 17, 1980.

OPINIONS BELOW

The two opinions of the Court of Appeals in this case,* which have not yet been reported, are reprinted

* Petitioner's suit raises two principal legal issues, one of which is similar to the principal legal issue presented in a separate suit

in Appendices A and B. The decision of the United States District Court for the District of Columbia, which was reversed on appeal and also is unreported, has been attached as Appendix C.**

JURISDICTION

The judgment of the Court of Appeals was entered on October 17, 1980. The Virgin Islands subsequently filed a timely petition for rehearing and suggestion for rehearing en banc, which were denied by orders of the Court of Appeals dated December 18, 1980 (Appendix E). This Court possesses jurisdiction under 28 U.S.C. § 1254(1). In accordance with 28 U.S.C. § 2101(c) and Rule 20 of the Supreme Court Rules, this petition for a writ of certiorari was due on or before March 18, 1981, and thus has been timely filed.

STATUTE INVOLVED

Section 28 of the Revised Organic Act of the Virgin Islands, 68 Stat. 497 [1954 Act], provides in material part:

(a) The proceeds of customs duties, the proceeds of the United States income tax, the proceeds of any taxes levied by the Congress on the inhabitants of the

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filed by the Commonwealth of Puerto Rico. On appeal, the court below consolidated these cases for briefing purposes and then handed down two opinions, one covering the overlapping legal issue and a second covering the issue raised only by the Virgin Islands.

** The District Court's decision in *Commonwealth of Puerto Rico* v. *Blumenthal*, which is incorporated by reference into the District Court's opinion in this case, is attached as Appendix D.

Virgin Islands, and the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands, less the cost of collecting all of said duties, taxes, and fees, shall be covered into the treasury of the Virgin Islands, and shall be available for expenditure as the Legislature of the Virgin Islands may provide: * * *. [Codified, with amendments, at 48 U.S.C. § 1642.]

(b) Subchapter B of chapter 28 of the Internal Revenue Code is amended by adding to section 3350 thereof the following subsection:

> "(c) Disposition of internal revenue collections. —Beginning with the fiscal year ending June 30, 1954, and annually thereafter, the Secretary of the Treasury shall determine the amount of all taxes imposed by, and collected during the fiscal year under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States. The amount so determined less 1 per centum and less the estimated amount of refunds or credits shall be subject to disposition as follows:
>
> "(i) There shall be transferred and paid over to the government of the Virgin Islands from the amounts so determined a sum equal to the total amount of the revenue collected by the government of the Virgin Islands during the fiscal year, as certified by the Government Comptroller of the Virgin Islands. * * *." [Codified at 26 U.S.C. § 7652(b)(3).]

* * *

(d) There shall be levied, collected, and paid upon all articles coming into the United States or its possessions from the Virgin Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries, and the in-

ternal revenue taxes imposed by section 3350 of title 26, United States Code: * * *. [Codified at 48 U.S.C. § 1644.]

STATEMENT

A. Legal and Factual Background

During the dozen years 1966-1978, the newly constructed Amerada Hess refinery in St. Croix produced and shipped over 140 million barrels of gasoline and substantial amounts of other petroleum products for consumption within the mainland United States. The excise taxes paid upon the importation and sale of this gasoline and the customs duties collected on the gasoline and other petroleum products are estimated by the Treasury Department to exceed $500 million to date, and that amount is increasing at the rate of about $60 million per year. The central issue in this case is whether such revenues, instead of being retained by the federal government, should not have been turned over to the Virgin Islands in accordance with section 28 of its Revised Organic Act, 64 Stat. 497 (hereinafter "1954 Act"). The background of this substantial controversy is summarized below.

The United States acquired sovereignty over the Virgin Islands by purchase from Denmark pursuant to the Treaty of August 4, 1916, 39 Stat. 1706—for reasons of national security and not as a source of profit. See H.R. Rep. 1505, 64th Cong., 2d Sess. (1917), pp. 4-5 (statement of Secretary of State Lansing). In the Act of March 3, 1917, 39 Stat. 1132, Congress provided for the government of the Islands and, with respect to their fiscal affairs, expressly directed: (1) that "there shall be levied, collected, and paid upon all articles coming into the United States . . . [from the Virgin

Islands], the rates of duty and internal revenue taxes which are required to be levied, collected, and paid upon like articles imported from foreign countries" (sec. 3); and (2) that all laws now imposing taxes in the Virgin Islands, "including the customs laws and regulations, shall, in so far as compatible with the changed sovereignty . . . , continue in force and effect" (sec. 4). Section 5 of the 1917 Act then specified:

> That the *duties and taxes collected in pursuance of this Act* shall not be covered into the general fund of the Treasury of the United States, but shall be used and expended for the government and benefit of said islands under such rules and regulations as the President may prescribe. (Emphasis added.)

Nothing in the language or in the legislative history of the 1917 Act suggests that the rebate requirement of section 5 was applicable only to the local duties and taxes carried forward under section 4 and not to the federal duties and taxes imposed under section 3.[1] Nonetheless, the Comptroller of the Treasury, in an opinion dated April 14, 1917, advised the Commissioner of Internal Revenue to such effect, in essence because the latter revenues assertedly were not "collected in pursuance of" the 1917 Act. 23 Comp. Dec. 574 (1917) at 575. The Virgin Islands, then under the administration of the Navy Department, did not possess the political institutions or power to challenge that ruling, and so suffered from its impact for years.[2]

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[1] See, generally, H.R. Rep. 1505, 64th Cong., 2d Sess. (1917); hearings on H.R. 20755, 64th Cong., 2d Sess. (1917), especially pt. 2, pp. 29-47, testimony of Brigadier General F. McIntyre, Chief of the Bureau of Insular Affairs.

[2] In 1926, Attorney General Sargent adopted the Comptroller's opinion without further legal analysis. 35 Op. Att'y Gen. 63

During World War II and thereafter, commerce with the Virgin Islands substantially decreased, thus causing a sharp drop in revenues and a financial crisis for the Virgin Islands government. Congress addressed this continuing problem in section 28 of a Revised Organic Act for the Virgin Islands [3] by providing a wholly new funding formula designed to make the Islands financially self-sufficient. Specifically, section 28 (b) of the 1954 Act created a unique matching fund under which "the amount of all taxes imposed by, and collected during the fiscal year under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States," less certain items not here relevant, was to be "transferred and paid over to the government of the Virgin Islands" in such amount as would equal "the total amount of the revenue collected by the government of the Virgin Islands. . . ." In other words, for each dollar of revenue raised by the Virgin Islands, the United States was to contribute a second dollar out of

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(1926). In 1931, however, administrative responsibility for the Virgin Islands was vested in the Secretary of the Interior, and on February 3, 1941, Interior Department Solicitor Margold issued a memorandum showing in detail why the Comptroller's 1917 opinion was "incorrect." (See Appendix F.) Despite Secretary Ickes' endorsement of the Margold memorandum, Attorney General Jackson, again without further legal analysis, wrote on March 3, 1941, that he would adhere to the 1917 opinion.

[3] The first Organic Act of the Virgin Islands, calling for local legislatures and a governor appointed by the President, was enacted on June 22, 1936. 49 Stat. 1807. Section 35 of this Act provided that "the proceeds of customs duties, less the cost of collection . . . shall be covered into the treasury of the Virgin Islands . . . ." The 1936 Act, like the 1917 Act, did not refer to the covering over or rebate of U.S. internal revenue taxes.

the proceeds of federal taxes upon Virgin Islands products imported into the United States. S. Rep. 1271, 83rd Cong., 2d Sess. (1954), p. 5.

During the past 25 years, the Virgin Islands have responded to the challenge of the matching fund provision in the 1954 Act by increasing local revenues from $2 million to over $100 million. However, because of the position taken by the Secretary of the Treasury that excise taxes paid on gasoline refined in and imported from the Islands do not fall within the scope of section 28(b), the federal government has not kept pace—to the extent that, for the fiscal year ending June 30, 1978, the last year for which figures are available, local revenues exceeded $124 million while matching funds were only $22.6 million. That ever-increasing gap between promise and performance has caused a new financial crisis for the Virgin Islands and, indeed, has led once more to the very extra federal subsidies which the 1954 Act was designed to end.[4]

With respect to customs duties, section 28(a) provides that the "proceeds of customs duties . . . shall be covered into the treasury of the Virgin Islands. . . ." The legislative history of the 1954 Act does not indicate that Congress even was aware of, much less intended to endorse, the Treasury Department's distinction between customs duties on goods entering the Virgin Islands and custom duties on goods entering the United States from the Virgin Islands.[5] The legislative history

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[4] See, *e.g.*, Pub. L. 94-392, 90 Stat. 1193 (1976) ($8.5 million); Pub. L. 95-134, 91 Stat. 1159, 1163 (1977) ($14 million); Pub. L. 95-348, 92 Stat. 487, 491 (1978) (up to $20 million for each of three years).

[5] The 1936 and 1954 Organic Acts of the Virgin Islands do not include the reference to "duties and taxes collected in pursuance

of the 1954 Act, though, does make clear that Congress intended section 28 to bring the Virgin Islands to the point of "self sufficiency" and to eliminate the need for future "handouts from the Federal Government." *Id.* at pp. 4-5; 100 Cong. Rec. 8663 (1954) (statement of Representative Saylor on H.R. 5181, a similar bill). Moreover, that manifest legislative purpose cannot be achieved unless the customs duties and federal excise taxes upon gasoline refined in the Virgin Islands and transported to the mainland, at issue in this case, are turned over to petitioner.

Pursuant to Public Law 90-496, 82 Stat. 837 (1968), the Virgin Islands gained additional powers of self-government, including the right to elect their own governor, and finally possessed the independent political institutions necessary to assert their statutory rights. At the request of the Virgin Islands Governor, the Interior Department on June 30, 1975, again requested a ruling from the Justice Department that the Virgin Islands are entitled to the proceeds of the customs duties and gasoline excise taxes at issue in this case. (Appendix G.) Notwithstanding the intervening passage of the 1954 Act, Assistant Attorney General Scalia rejected that request on the grounds offered by the Comptroller in 1917, and echoed by Attorneys General Sargent and Jackson in 1926 and 1941, respectively, which were characterized as a "settled administrative interpretation," and on the basis of the Treasury De-

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of this Act," which appears in section 5 of the 1917 Act and upon which the Comptroller's 1917 opinion so heavily relied. The 1954 Act was intended to "become a new basic charter of government" for the Virgin Islands to take the place of predecessor statutes. *Virgo Corp.* v. *Paiewonsky*, 384 F.2d 569, 576 (3d Cir. 1967), *cert. denied*, 390 U.S. 1041 (1968).

partment's construction of statutes relating to the Commonwealth of Puerto Rico. The filing of this suit followed.

B. The Proceedings Below

(1) *The District Court*: The Virgin Islands initiated this litigation against then Secretary of the Treasury William E. Simon by the filing of a complaint on May 21, 1976, in the United States District Court for the District of Columbia seeking a declaratory judgment, injunctive relief, mandamus and an accounting and asserting jurisdiction under 28 U.S.C. §§ 1331, 1340, 1361 and 2201, 5 U.S.C. §§ 701-706, and D.C. Code § 11-521(a)(1).[6] The complaint contained three counts: (a) that under section 28(b) of the 1954 Act, petitioner is entitled to receive, but the Secretary was withholding, excise taxes collected pursuant to section 4081 of the Internal Revenue Code, 26 U.S.C. § 4081, upon the sale of gasoline refined in the Virgin Islands and transported to the United States; (b) that under section 28(a) of the 1954 Act, petitioner is entitled to receive, but the Secretary was withholding, the proceeds of U.S. customs duties collected upon gasoline and other petroleum products imported into the United States from the Virgin Islands; and (c) that oil import license fees, authorized under 19 U.S.C. § 1862 and imposed by Presidential proclamation upon gasoline shipped from the Virgin Islands to the United States, also are customs duties to which petitioner is entitled, but which the Secretary unlawfully was withholding.

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[6] Petitioner is an unincorporated territory of the United States (*Smith* v. *Government of Virgin Islands*, 375 F.2d 714, 717-18 (3d Cir. 1967)), which has been granted the right to sue under 48 U.S.C. § 1541(b).

The Secretary's answer was filed on July 26, 1976. The Virgin Islands submitted a motion for summary judgment on December 3, 1976, and on January 12, 1977, the Secretary filed an opposition to this motion and a cross motion for summary judgment. The District Court (Gasch, J.) issued a memorandum opinion on October 11, 1978, upholding petitioner's claims to customs duties and gasoline excise taxes, but not for oil import license fees, and entered a judgment in accordance with that opinion on the same date.

In ruling for the Virgin Islands on the customs question, Judge Gasch observed that the term "customs duties" employed in section 28(a) of the 1954 Act, standing alone, could not be viewed as unambiguous because it does not differentiate between customs duties imposed under local law on goods brought into the Virgin Islands and customs duties imposed under federal law on goods brought into the United States from the Virgin Islands. On the basis of an analysis of section 28 as a whole, however, the District Court concluded that the reference in section 28(a) could not logically be limited to local duties. Thus, with respect to the other provisions of section 28(a), Judge Gasch considered highly significant the fact that the three categories of taxes other than customs duties which section 28(a) makes subject to rebate are all United States levies affecting in some way the Virgin Islands and not only local taxes imposed by the Virgin Islands government. With respect to the other subdivisions of section 28, the District Court also pointed out, *inter alia,* that section 28(d) provides for the imposition of U.S. duties on articles coming to the mainland from the Virgin Islands—the very customs duties the Secretary was arguing Congress did not intend to include within its general reference to "customs duties" in

section 28(a).[7] Finally, Judge Gasch rejected the Comptroller's 1917 opinion as an administrative construction of the 1917 Act "of questionable validity" rendered "outdated" by the changes in the law effected by the 1936 and 1954 Organic Acts, including, in particular, elimination of the clause "in pursuance of this Act" upon which the Comptroller had relied. (App. 75a.)

In ruling for the Virgin Islands on the federal excise tax question, Judge Gasch relied upon his opinion in *Commonwealth of Puerto Rico* v. *Blumenthal*, C.A. 75-1035 (D. D.C.), decided October 10, 1978, holding that the cover-over provision applicable to Puerto Rico requires that revenues from the excise tax on Puerto Rican gasoline be transferred into the Puerto Rican Treasury (Appendix D). Petitioner's claim, according to the District Court, was "virtually identical." (App. 67a.) Like section 28(b) of the 1954 Virgin Islands Act, section 9 of the Jones Act, codified at 26 U.S.C. § 7652(a)(3), and 48 U.S.C. § 734, provides for a rebate of "all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States. . . ." The District Court found this statutory provision to have a "plain meaning" and that the tax upon gasoline imposed under 26 U.S.C. § 4081 falls within its scope. Judge Gasch rejected the Secretary's arguments that section 9 of the Jones Act (and presumably section 28(b) of the 1954 Act) is ambiguous, that the legisla-

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[7] See, also, p. 13, n.9, *infra*. Judge Gasch further noted that his "conclusion, based on the ordinary meaning of the term 'customs duties' within the context of section 28, is confirmed by the lack of any legislative history to the 1954 Revised Organic Act indicating that 'customs duties' only extends to those duties imposed on imports into the Virgin Islands." App. 73a, 74a.

tive history of the cover-over provision allegedly shows it was designed to include only "equalization tax levies" on tobacco and alcohol, and that the laws and decisions uniquely applicable to Puerto Rico (and presumably not to the Virgin Islands), such as the Foraker Act, 31 Stat. 77 (1900), dictated a contrary result. (App. 90a.)

Lastly, the District Court ruled that oil import license fees are not customs duties.

(2) *The Court of Appeals*: On December 4, 1978, the Secretary filed a notice of appeal from the District Court's judgment and petitioner filed a notice of cross appeal on December 18, 1978. As a matter of convenience, the court below consolidated these appeals for purposes of briefing and argument with the appeal and cross appeal in *Commonwealth of Puerto Rico* v. *Blumenthal, supra.*[8]

In an opinion handed down on October 17, 1980, the Court of Appeals reversed the District Court's judgment on the customs question. According to the court below, the provision in section 28(a) of the 1954 Act that "the proceeds of customs duties" be covered into the Virgin Islands Treasury, "[l]iterally read, . . . could require cover of *all* customs duties anywhere collected by the United States government." (App. 12a; emphasis in original.) Having created a "patent absurdity" as its benchmark, the Court of Appeals then: (a) read section 28(a) as limiting "the items covered to those with some substantial nexus to the Islands;" and (b) determined that the required nexus depended "on situs of collection," *i.e.*, local customs duties only,

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[8] Since Puerto Rico is within the customs territory of the United States, unlike the Virgin Islands, the Puerto Rico case did not involve any issue as to customs duties.

because that test "seems simpler to implement. . . ."[9] (App. 16a, 17a.)

With understandable concern that the foregoing analysis of section 28(a) did not appear persuasive, the Court of Appeals observed that, "were we to have approached the question of statutory construction unencumbered by years of administrative practice under the 1954 Act . . . , we might have looked with favor upon a construction of the statute which would have required cover to the Islands of customs duties levied upon goods produced in the Islands." (App. 17a-18a.) Accordingly, the court turned for guidance to past administrative practice and the legislative history of the 1954 Act, but, rather than inquiring into whether the administrative practice was legally sound, instead characterized "the more appropriate inquiry" as

> whether there was anything in the 1954 Act or its legislative history to show an intent to change an administrative course which, while not totally unopposed, nonetheless had been followed for more than thirty years before the 1954 Act was passed. (App. 18a.)

Finding the 1954 Act and its legislative history silent on the subject, the Court of Appeals concluded:

> We recognize that a primary concern of the 1954 Act was to advance the Islands' self sufficiency and local autonomy and that this concern is consonant with an interpretation of the Act to require the cover of mainland duties. However, we

[9] The court below failed to explain why Congress would have intended the term "customs duties" in section 28(a) of the 1954 Act to apply only to local duties, which are imposed under section 8(a) of the Act, and not to U.S. duties, which are imposed under section 28(d).

> cannot believe that so dramatic a change to the benefit of the Islands would be made without debate or even comment within the contours of an act where fiscal concerns weighed so heavily. . . .[10] (App. 20a.)

In a companion opinion handed down on October 17, 1980, which involved also the Commonwealth of Puerto Rico, the court below reversed the District Court's judgment on the gasoline excise tax question too. Whereas District Judge Gasch had found the rebate language of the Virgin Islands and Puerto Rican statutes to have a plain meaning and looked to their legislative histories only to ascertain that this plain meaning was consistent with the purposes of the legislation, the Court of Appeals found the same statutory language to be "highly ambiguous" and looked to legislative history to give it meaning. (App. 33a.) Even though, under this approach, the very different evolution and legislative history of the 1954 Act should have been considered in connection with the Virgin Islands claim, the Court of Appeals addressed its analysis exclusively to the statutes, such as the Foraker and Jones Acts, *supra,* which affect only Puerto Rico.

As in its opinion concerning customs duties (p. 12, *supra*), the court below began its analysis of the excise tax issue with a straw man—the proposition that the term "all taxes" in the Jones Act, interpreted "literally," would require "the covering over of all tax rev-

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[10] Because of its holding on the customs duties issue, the Court of Appeals did not pass upon the Virgin Islands' claim that oil import license fees are customs duties and, accordingly, that question is not presented in this petition. The question will be ripe for reconsideration should this Court grant certiorari and reverse the decision below.

enues ever collected when an article from Puerto Rico later becomes the subject of a taxable transaction in the United States," including "estate and gift taxes levied years after the article entered the United States and mixed with domestic goods in the general market." (App. 31a.) Having thereby established a possible construction of the statute which would be "absurd," the court below looked beyond its language and determined in summary: (a) that in order to equalize the competitive positions of Puerto Rican and mainland producers, Congress provided in the Foraker Act that articles made in Puerto Rico and sent to the mainland market would be subject to an excise tax at the same rate as the federal tax laid in respect of domestic manufacture; (b) that Congress intended in the Jones Act to authorize a rebate to the Puerto Rico Treasury only of those taxes imposed for equalization purposes; and (c) that the gasoline excise tax collected under 26 U.S.C. § 4081 is not such an equalization tax and thus not subject to covering over. As noted above, except for its assumption "that an interpretation of the Puerto Rico statute is applicable to the Virgin Islands statute as well" (App. 29a), the Court of Appeals did not relate these conclusions to the language of section 28(b) or the legislative history of the 1954 Act.

REASONS FOR GRANTING THE WRIT

I. This Case Raises Critical Questions Concerning The Future Fiscal Relationship Of The Virgin Islands To The United States Which Are Worthy Of This Court's Review.

The issues in this case, characterized by the court below as "a substantial controversy" (App. 24a), are of transcendent and historic importance to future financial relationships between the Virgin Islands and the

Federal Government. Based upon estimates of the U.S. Treasury Department, the customs duties collected and the excise taxes paid upon the importation and sale of gasoline and other petroleum products from the Amerada Hess refinery in St. Croix, which the Secretary has refused to cover over to the Virgin Islands Treasury, already exceed $500 million and are accumulating currently at a rate of over $60 million per year. Statement, p. 4, *supra*. Standing alone, the "significant economic import" to both governments of the large sums in dispute make the questions here presented worthy of this Court's review. *See United States* v. *Sioux Nation of Indians*, —— U.S. ——, ——, 100 S. Ct. 2716, 2728 (1980).

The magnitude of the amount in controversy, however, only imperfectly defines the critical importance of the legal questions here presented.[11] The revenues withheld by the Secretary would achieve for the Virgin Islands the "self sufficiency and local autonomy" which Congress clearly intended when the 1954 Revised Organic Act was approved. App. 20a; S. Rep. 1271, 83rd Cong., 2d Sess. (1954), p. 5. Their continued denial will perpetuate a condition of dependence upon yearly federal handouts and deprive all the Islands' inhabitants of the substantial economic benefits they would otherwise have derived from the location of the Amerada Hess refinery in St. Croix. See statement, p. 7, *supra*. In short, nothing less than the future fiscal independence of the Virgin Islands is here at stake.

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[11] In his initial request for a hearing *en banc* before the Court of Appeals, the Secretary emphasized the "exceptional importance" of this case to the United States, the Commonwealth of Puerto Rico and the Virgin Islands, and he cannot in good faith argue the contrary position to this Court.

II. This Case Presents Important Questions Of Statutory Construction Involving The Organic Acts Of Two Territories Which Should Be Resolved By This Court.

The Court of Appeals concluded in this case that the language of the Organic Acts for the Virgin Islands and Puerto Rico "abounds in ambiguities" (App. 29a) and then proceeded to resolve every perceived ambiguity against the claims of the two territories. In so holding, the court below: (1) ignored with respect to customs duties the teachings of this Court that the words of a statute should be read in context (*see, e.g., Richards* v. *United States,* 369 U.S. 1, 11 (1962)); and (2) ignored with respect to excise taxes the teachings of this Court that the words of a statute should be given their plain meaning (*see, e.g., Tennessee Valley Authority* v. *Hill,* 437 U.S. 153 (1978)). Instead of interpreting the words of the statutes in the context in which they appeared, the court below found the Congressional purpose in an inapposite and ambiguous legislative history and a strained administrative construction which Congress never endorsed and which the Islands were powerless to challenge because they lacked any measure of local autonomy. As a result, the clear intent of Congress to grant to the Islands' Treasury the proceeds of all taxes and duties derived from commerce with the Islands was thwarted, and the enlightened fiscal policy reflected in the words of the 1954 Act was deprived of any practical meaning. The decisions below have a devastating impact on relations between the federal government and its territories and raise important questions of statutory construction concerning legislation of particular national sensitivity which should be considered by this Court.

(A) *Customs Duties*: Section 28(a) of the 1954 Act requires that the "proceeds of customs duties . . . be

covered into the treasury of the Virgin Islands. . . ." Both the District Court and the Court of Appeals found this provision to be ambiguous because the statute does not specifically recite whether "customs duties" mean only local duties imposed upon goods entering the Islands (which are nominal because of their status as a free port) or also include the more substantial federal duties upon goods entering the mainland from the Islands.[12] Petitioner does not disagree with this premise.

Unlike the District Court, which looked to the four corners of the 1954 Act for guidance in resolving the statutory ambiguity,[13] the Court of Appeals construed section 28(a) on the basis of an unrelated law, 31 U.S.C. § 484,[14] and two assumptions as to Congressional intent, nowhere expressed in the text of the 1954 Act: (1) that the revenues covered must have "some sub-

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[12] According to the Court of Appeals, "customs duties," interpreted literally, could mean "*all* customs duties anywhere collected by the United States government" (App. 12a), regardless of the source of the imported goods—a reading which goes far beyond the subject matter of the 1954 Act.

[13] See Statement, pp. 10-11, *supra;* in addition to the points there summarized, the District Court noted that, where Congress intended to cover over only locally collected imposts, as in the case of "quarantine, passport, immigration, and naturalization fees," section 28(a) of the 1954 Act expressly so provides. App. 72a.

[14] This statute was enacted to prevent collectors of customs from withholding payments from the U.S. Treasury on the grounds that they were obligated to pay fees to individuals for services rendered or that they were entitled to such fees as compensation. See *Ellsworth* v. *United States,* 14 Ct. Cl. 382, 394 (1878), *aff'd,* 101 U.S. 170 (1880). The statute provides no guidance on whether customs duties are local or federal because it, too, does not distinguish between them.

stantial nexus to the Islands"; and (2) that such "nexus" depends "purely on situs of collection." Statement, pp. 12-13, *supra*. The fatal flaw in the lower court's first assumption is that section 28(a) also provides for the rebate of U.S. taxes paid by Virgin Islands residents on income from mainland sources, which has no nexus to the Virgin Islands, while articles having the greatest nexus to the Islands, *i.e.*, less than 50% foreign material, are wholly exempt from customs duties under section 28(d) of the 1954 Act—both clear indications that Congress did not consider "nexus" the key as to which revenues should be covered over.[15] The lower court's second assumption is equally untenable since the matching fund provision of section 28(b) refers to taxes "on articles produced in the Virgin Islands and transported to the United States," where the "situs of collection" by definition is outside the Islands. The Court of Appeals' analysis of the 1954 Act, therefore, plainly violates the settled principle laid down by this Court that the words of a statute must be construed in their legislative context. *Richards* v. *United States, supra; Kokoszka* v. *Belford,* 417 U.S. 642, 650 (1974); *Philbrook* v. *Glodgetl,* 421 U.S. 707, 713 (1975).

In an effort to shore up an admittedly shaky interpretation of the statutory language, the court below relied upon the 1917 Comptroller's opinion that the term "customs duties" employed in the 1917 Act means local duties and the failure of Congress in the 1954 Act

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[15] The court below did not attempt to disinguish *American Maritime Ass'n* v. *Blumenthal,* 590 F.2d 1156 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 943 (1979), which leaves no doubt that the gasoline at issue in this case has a substantial nexus with the Virgin Islands.

expressly to repudiate that administrative position. Statement, pp. 13-14, *supra*. This line of reasoning ignores the legislative intent that the 1954 Act was intended to "become a new basic charter of government." *Virgo Corp.* v. *Paiewonsky*, 384 F.2d 569, 576 (3rd Cir. 1967), *cert. denied*, 390 U.S. 1041 (1968). Moreover, it overlooks the significant fact that, until the 1970's, the Virgin Islands did not possess the political institutions or power necessary to challenge the Comptroller's opinion (Statement, p. 5, *supra*), and the canon that an uncontested administrative ruling is entitled to relatively little weight. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 290 (1946); *SEC* v. *Sterling Precision Corp.*, 393 F.2d 214, 220 (2d Cir. 1968). The Virgin Islands are entitled to their day in court, not to a holding that their claims under the 1954 Act are foreclosed by executive rulings made a half century before they had the right to fight.

The Court of Appeals should not have deferred to the administrative construction of a statute which is erroneous (*Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n.*, 390 U.S. 261, 272 (1968)), and Congressional silence with respect to a longstanding administrative practice does not constitute approval. *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978). Indeed, in 1941, when the Virgin Islands were unable to engage in self-help, and again in 1975, the Department of the Interior, the agency vested with supervisory responsibility over their affairs, expressed the unqualified view that the Islands are entitled to a rebate of customs duties collected on goods shipped to the United States. (See Appendices F and G.) That is the administrative construction of the 1917 and 1954 Acts which is en-

titled to great weight in this case. *Udall* v. *Tallman*, 380 U.S. 1 (1965).

(B) *Excise Taxes*: Section 28(b) of the 1954 Act establishes a matching fund for rebate to petitioner of "all taxes imposed by, and collected during the fiscal year under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States." In interpreting the otherwise plain meaning of these words, the Court of Appeals first advanced the far-fetched proposition that the term "all taxes," read "literally," would require "the covering over of all revenues ever collected when an article from [the Virgin Islands] later becomes the subject of a taxable transaction in the United States," including "estate and gift taxes levied years after the article entered the United States and mixed with domestic goods in the general market." [16] This wrenching from the words of a statute of a meaning which they ordinarily would not bear in order to escape a severe or unexpected adverse financial consequence for the United States is exactly the kind of statutory construction which this Court repeatedly has condemned. *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930); *Tennessee Valley Authority* v. *Hill*, *supra*.

Having divined an ambiguity in the covering over provisions of the Virgin Islands and Puerto Rican Organic Acts, the court below searched for guidance in defining the statutory language in legislative history. This search, however, did not include a review of the evolution and legislative history of the 1954 Act, which

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[16] An estate tax is, of course, not a tax upon property, but rather a tax imposed on the shifting of economic benefits. *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939).

offers no support for the court's analysis. Instead, the search into legislative history by the Court of Appeals was confined exclusively to statutes, such as the Foraker and Jones Acts, *supra*, which affect only the Commonwealth of Puerto Rico.[17] Had an appropriate review of the laws relating to the Virgin Islands been made, the court below would have ascertained that Congress did not intend in the 1954 Act to establish any linkage between the internal revenue taxes therein subject to rebate and the Foraker Act, that the limit on rebates to the Virgin Islands for which Congress opted in section 28(b) was not related to "equalization taxes," but rather was based on a totally different concept of a matching fund, and that Congress fully recognized that the language it employed would require, subject to the matching fund limits, the payment into the Virgin Islands Treasury of the "internal revenue taxes paid by mainland consumers on Virgin Islands products imported into the mainland. . . ." S. Rep. 1271, 83rd Cong., 2d Sess. (1954), pp. 4-5. Had this legislative history been considered, it would have been clear to the court below, as it was to the District Court, that the plain meaning of the language of the statutes was entirely consistent with their legislative purpose.

In summary, this case involves important questions of statutory construction, the meaning of key provi-

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[17] The Commonwealth of Puerto Rico is filing a petition for a writ of certiorari seeking review of the decision below with respect to the excise tax issue on the ground, *inter alia*, that the Court of Appeals misconstrued the Foraker and Jones Acts. Petitioner subscribes to the reasons given by Puerto Rico for granting the writ and incorporates them herein by reference.

sions of the Organic Acts of two United States territories, and issues of enormous legal and economic consequence which should be considered and resolved by this Court.

Indeed, the ultimate decision in this case will be of historic importance to the relationship between the United States and its territories. The decisions of the court below resurrect and elevate executive actions which doomed the people of the Islands to political and economic subjugation for almost 40 years before passage of the 1954 Revised Organic Act. These decisions cannot be reconciled with controlling principles of statutory construction mandated by this Court, totally undermine the Congressional intent under the 1954 Act to grant to the people of the Islands an incentive to obtain the full financial benefit of their commerce with the United States, and deprive the 1954 Act of any practical significance as a new charter of government. Only this Court can make certain that years of struggle for a greater measure of political and economic autonomy will not be frustrated by the court below's revisionist construction of the 1954 Act and thus prevent a tremendous injustice to the people of the Islands.

CONCLUSION

This is an historic case. In the exercise of its increasing independence from federal domination, the Virgin Islands for the first time is suing an executive officer of the United States over issues of vital consequence to the future financial relationship between the two governments. For the reasons herein set

forth, the Islands' petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1021*

VIRGIN ISLANDS

v.

W. MICHAEL BLUMENTHAL, Secretary
Department of the Treasury, APPELLANT

No. 79-1022

VIRGIN ISLANDS, APPELLANT

v.

W. MICHAEL BLUMENTHAL, Secretary
Department of the Treasury

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 76-0916)

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*In this opinion, we address that portion of No. 79-1021 dealing with the customs duties issue unique to the Virgin Islands case. In a companion opinion issued simultaneously herewith, we disposed of another portion of No. 79-1021 dealing with the covering over of gasoline tax revenues to the Virgin Islands.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued November 16, 1979

Decided October 17, 1980

Ernest J. Brown, Attorney, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General, and *David English Carmack*, Attorney, Department of Justice, were on the brief for the Secretary of the Treasury as appellant.

Milton Eisenberg, with whom *Theodore C. Hirt* and *Ive Arlington Swan*, were on the brief for the Virgin Islands as appellee in case No. 79-1021 and as appellant in case No. 79-1022.

Myron C. Baum, also entered an appearance for the Department of Justice.

Before: McGOWAN and WALD, *Circuit Judges*, and JOHN PRATT** *United States District Judge* for the District of Columbia Circuit.

Opinion for the court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge:* In a companion opinion issued today[1] this panel resolves several issues presented by these consolidated appeals. In this opinion we separately address a question concerning the disposition of certain customs duties which is at issue only in the appeals taken in the Virgin Islands case.

For more than sixty years the disposition of customs duties collected on goods entering the United States by shipment from the Virgin Islands (the "Islands") has not differed from the disposition of most other customs duties collected on entry in this country; the amounts collected have been paid into the general United States Treasury. Objecting to this disposition, the Islands brought suit in

** Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

[1] Commonwealth of Puerto Rico v. Blumenthal, Nos. 79-1020, 1021, & 1024 (D.C. Cir. Oct. 17, 1980).

the district court, contending under the applicable statutory language that the proceeds of customs duties levied here on goods shipped from the Islands must be "covered"[2] to the Islands' treasury. The district judge agreed with the Islands and on cross-motions for summary judgment, he "ORDERED and DECLARED that section 28(a) of the 1954 Revised Organic Act of the Virgin Islands requires the . . . Secretary of the Treasury to cover into the Treasury of the Virgin Islands all customs duties . . . collected on goods transported into the United States from the Virgin Islands . . . ."[3]

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[2]*See id.*, slip op. at 2 n.1.

[3]Order, Virgin Islands v. Blumenthal, Civ. No. 79-0916 (Oct. 11, 1978), Appendix in Nos. 79-1021 & 79-1022 (Islands App.) at 136. The Islands had originally complained that the failure to cover these duties had violated both the Act of March 3, 1917, ch. 171, § 5, 39 Stat. 1132, 1133 (1917) [hereinafter cited as 1917 Act], and the Revised Organic Act of the Virgin Islands, Pub. L. No. 517, ch. 558, § 28(a), 68 Stat. 497, 508 (1954) [hereinafter cited as 1954 Act]. The Islands' motion for partial summary judgment, which sought only declaratory relief, claimed entitlement solely on the basis of the 1954 Act. The trial judge concluded that the 1954 Act required the United States to cover over the customs duties at issue. Virgin Islands v. Blumenthal, Civ. No. 76-0916, slip op. at 11 (Oct. 11, 1978), Islands App. at 121, 131 [hereinafter cited as Memorandum]. No such conclusion was reached concerning the 1917 Act. *See id.* at 10, Islands App. at 130. The precise retrospective intent of the order is unclear, but it is certain the trial judge contemplated some rebate of duties already collected. *Id.* at 14-15, Islands App. at 134-35.

The Secretary's cross-motion in the district court sought summary judgment "with respect to all of the issues in this action." Cross-Motion by Defendant for Summary Judgment, Virgin Islands v. Blumenthal, Civ. No. 76-0916 (filed Jan. 12, 1977), Islands App. at 25. Nevertheless, his supporting arguments and the district court's decisional rationale were tied to a construction of the 1954 Act. If the Secretary's motion implicitly posed the question whether the 1917 Act required the cover of

We have carefully examined the pertinent statutory language, the statutory, administrative and legislative history, and the full record of the proceedings in the district court. Because we think the ambiguous language of the Revised Organic Act of the Virgin Islands (the 1954 Act),[4] when read in light of its statutory, administrative and legislative history, indicates an intention to produce a result different from that reached by the district court, we vacate the judgment there entered and remand with directions to enter judgment with respect to the 1954 Act in favor of the Secretary of the Treasury.[5]

I. Background

Section 28(a) of the 1954 Act provides:

> The *proceeds of customs duties*, the proceeds of the United States income tax, the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands, *less the cost of collecting all of said duties, taxes, and fees, shall be covered*

customs duties collected on Islands' goods, the district court's memorandum did not address it and we thus do not consider that question to be properly before us.

[4] Cited *supra* note 1. The 1954 Act was codified at 48 U.S.C. § 1541 *et seq.* (1976). Because that title of the United States Code has not been enacted into positive law, however, all citations in this opinion are to the session laws. *See* Preface, U.S.C. at VII (Supp. III 1979).

[5] The district court rejected an argument made by the Island that oil import license fees were "customs duties" within the meaning of the cover provisions of the 1954 Act. Such fees are imposed on petroleum products transported into the United States from the Islands. *See* Proclamation No. 4210, 3 C.F.R. 31 (1974). Because of our disposition of the customs duties claim on which this argument is predicated we need not reach the question whether oil import license fees are customs duties for the purposes of the cover provisions of the 1954 Act.

> *into the treasury of the Virgin Islands*, and shall be available for expenditure as the Legislature of the Virgin Islands may provide.

(emphasis supplied).

According to the Islands, it was the "clear objective" of the 1954 Act and its predecessors that "revenues collected by the United States from commerce with the Islands be used for the benefit of the Islands."[6] "This Congressional objective has been thwarted," the Islands argue, by "decisions which, in the guise of interpretation, have rewritten the words of the Congress."[7]

A. *History of the Controversy*

The controversy dates from 1917, when the United States purchased the Islands from Denmark. Legislation enacted at the time of purchase[8] provided, in consecutively numbered sections, for the imposition of customs duties on Islands goods entering the mainland (section three), for the imposition of customs duties on goods entering the Islands (section four), and for the "cover" to the Islands' treasury of the "duties and taxes collected *in pursuance of this Act*" (section five) (emphasis supplied).[9] The Islands argue that the Congress that passed the 1917 Act fully intended to cover into the Islands' treasury customs duties on goods shipped from the Islands to the United States as well as customs duties on goods shipped into the Islands from elsewhere.[10]

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[6] Brief for Appellee in Nos. 79-1021 & 79-1022 at 3 [hereinafter cited as Islands Brief].

[7] *Id.*

[8] 1917 Act, *supra* note 3.

[9] *Id.* §§ 3-5, 39 Stat. at 1133.

[10] The Islands point out that St. Thomas, one of the Islands' constituent islands, was even in 1917 a "free port," and that Congress had been made aware of that fact. Islands Brief at 8, *citing Cession of Danish West Indian Islands: Hearings on*

However, less than two months after the 1917 Act became law, the Comptroller of the Treasury interpreted the cover provision quite differently from what the Islands assert was the manifest intention of Congress.[11] The Comptroller's interpretation had the effect of limiting the duties rebated to the Islands' treasury to those collected on goods entering the *Islands* (local duties) and of retaining in the United States' treasury those duties collected on goods entering the *mainland* by shipment from the Islands (mainland duties).[12] The Comptroller reasoned that only those duties specifically authorized for the first time by the 1917 Act were collected "in pursuance of this act;"[13] and that because mainland duties were collected under the previously and separately enacted general laws of the United States, the 1917 Act did not require cover of

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H.R. 20755 Before the House Comm. on Foreign Affairs, 64th Cong., 2d Sess. [31–] 32 (1917). Therefore, the covering over of locally collected duties would not have provided and could not have been intended to provide much revenue to the Islands, although the provision of revenue was one of the objectives of the 1917 Act.

[11] 23 Comp. Dec. 574 (1917).

[12] What the Comptroller decided was that only those duties described in section four of the 1917 Act were to be covered into the Islands' treasury. Apart from perpetuating previously applicable local customs laws, section four imposed a new "export duty" on sugar shipped from the Islands to any foreign country or to the United States. 1917 Act, *supra* note 3, § 4, 39 Stat. at 1133. Thus it seems that under the Comptroller's ruling this one form of "mainland duty," specific to Islands' goods, was to be covered into the Islands' treasury. The Comptroller found in Congressional debates an intent "that only revenue of the islands would be derived from articles imported thereto, except the export duty on sugar, which was imposed to compensate for the loss [of customs duties] on imports from the United States, which [under the 1917 Act] are to be admitted [to the Islands] free [of duty]." 23 Comp. Dec. at 576.

[13] *Id.* at 575.

these duties.[14] The Comptroller's decision was reinforced nine years later when an opinion issued by the Attorney General employed the same reasoning to deny cover of certain internal revenue taxes.[15]

Administrative practice concerning the cover of customs duties has not deviated from the Comptroller's interpretation, despite the enactment in 1936 of replacement legislation which omitted the "in pursuance of this Act" language,[16] and despite objections to the practice raised in

[14] *Id.* at 575–76.

[15] 35 OP. ATTY. GEN. 63 (1926). The 1917 Act imposed internal revenue taxes as well as duties on Islands goods coming into the United States and provided for cover of the taxes as well as the duties "collected in pursuance of this Act." Thus, an expansive reading of the statute might have required cover of all internal revenue taxes, as well as all customs duties, collected on goods shipped from the Islands. However, a reading of the tax cover independent of the duty cover was rejected by the Attorney General's opinion, which followed the reasoning of the Comptroller General to deny cover of a post-1917 tax on imported alcohol. That tax, the Attorney General opined, was not collected "in pursuance of" the 1917 Act.

[16] The relevant provisions of the 1917 Act were replaced in 1936 by the first Organic Act of the Virgin Islands, ch. 699, 49 Stat. 1807 (1936) [hereinafter cited as 1936 Act]. The "in pursuance of this Act" language was omitted and the pertinent language provided as follows:

> the proceeds of customs duties, less the cost of collection, and the proceeds of the United States income tax, and the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands shall be covered into the treasury of the Virgin Islands and held in account for the respective municipalities, and shall be expended for the benefit and government of said municipalities in accordance with the annual municipal budgets. The Municipal Council of Saint Croix may make appropriations for the purposes of said municipality from, and to be paid out of, the funds credited

1941 by the Department of the Interior in correspondence with the Justice Department.[17] In fact, apart from the position taken by the Interior Department in 1941, objections to this consistent administrative interpretation appear to have lain dormant for more than half a century.

The active interest which resurfaced in the 1970's may be attributable in part to the greater autonomy conferred upon the Islands' government by recent acts of Congress[18] and in part to that government's awareness of the large sums of mainland duties[19] and fees collected since the 1966

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to its account in the treasury of the Virgin Islands; and the Municipal Council of Saint Thomas and Saint John may make appropriations for the purposes of said municipality from, and to be paid out of, the funds credited to its account in said treasury.

Id., § 35, 49 Stat. at 1816. The phrase "in pursuance of this Act" is also omitted from the relevant portions of the 1954 Act.

[17] These objections were voiced in an opinion request dated February 28, 1941 from the Secretary of the Interior to the Attorney General. Islands App. at 94–95. Although the desirability of covering internal revenue taxes was emphasized, the Secretary urged the Attorney General to address cover of both taxes and duties. The request was supported by a memorandum from the Department of Interior Solicitor dated February 3, 1941, Islands App. at 88–93, which was critical of the 1917 decision of the Comptroller General. The Attorney General's opinion, issued March 3, 1941, adhered to the Justice Department's previous position. Islands App. at 96–100. *See* note 15, *supra*.

[18] The Islands' governor was popularly elected for the first time on November 3, 1970. Virgin Islands Elective Governor Act, Pub. L. No. 90–496, 82 Stat. 837–842 (1968). *See also* H. REP. NO. 1522, 90th Cong., 2d Sess. 6 (1968) (listing enactments since 1954 which "have provided greater self-government and responsibility for the Virgin Islands").

[19] According to an affidavit submitted in support of the Secretary's application to this court for stay pending appeal, "A very rough approximation can be made that the customs duties on petroleum products imported into the United States from the

opening of an Islands-based oil refinery.[20]

In 1975 the Interior Department, acting at the request of the Islands governor, asked the Justice Department to reconsider its continuing approval of the Comptroller's ruling.[21] The Department's response, however, only reconfirmed its earlier interpretation of applicable law.[22]

Virgin Islands may have amounted from 1966 to 1976 to $97,452,307." Affidavit of G.R. Dickerson, Deputy Commissioner of the United States Customs Service, Appellants' Motion for Stay Pending Appeal of District Court's October 11, 1978 Order, App. D at 2 (filed Jan. 5, 1979).

[20] Before gasoline production commenced in 1966 at the Amerada-Hess refinery in St. Croix, the total revenue collected on Virgin Islands shipments to the United States appears to have been small. Islands Brief at 3. *But see* Affidavit of G.R. Dickerson, *supra*, note 19 at 2. ("The Customs Service has no figures from which a reasonable estimate can be made of the amount of customs duties collected from 1917 to the present on articles imported into the United States from the Virgin Islands."). Since the Islands' purchase in 1917 a certain proportion of Islands' shipments has entered the mainland entirely duty-free. From 1917 to 1936 and apparently also from 1936 to 1954, customs duties were imposed on goods shipped from the Islands only when "foreign materials" comprised more than 20% of their value. 1917 Act, *supra* note 3, § 3, 39 Stat. at 1133. *See* 1936 Act, *supra* note 16, § 18, 49 Stat. at 1811 (perpetuating not inconsistent prior United States law applicable to the Islands). The permissible proportion of value derived from foreign materials was relaxed in 1954. Currently, goods from the Islands may enter duty-free if foreign materials contribute no more than 50% to their value. 1954 Act, *supra* note 1, § 28(d), 68 Stat. at 509.

[21] Letter from Associate Solicitor of the Department of the Interior Moody R. Tidwell to Assistant Attorney General Antonin Scalia (June 30, 1975). Islands App. at 101.

[22] Letter from Assistant Attorney General Antonin Scalia to Associate Solicitor of the Department of the Interior Moody R. Tidwell (Oct. 3, 1975), Islands App. at 105.

Earlier overtures to the Treasury Department had been no more successful. Rebuffed in these forums, the Islands brought suit in the district court in May, 1976, seeking, *inter alia*, declaratory and injunctive relief. The case was submitted for decision in June, 1978 on plaintiffs' motion for partial summary judgment and defendants' motion for summary judgment.

B. *The District Court's Decision*

The district court agreed with the Islands' interpretation of the 1954 Act and granted summary judgment to the Islands. Conceding some inherent ambiguity in the scope of the "customs duties" required by section 28(a) of the 1954 Act to be covered into the Islands' treasury, the district court nonetheless found an examination of the other provisions of section 28 persuasive of an intent to cover *mainland* duties into the Islands' treasury. The district court observed that each of the other provisions of section 28 dealt not with locally-imposed duties, taxes, or other local laws,[23] but with the specifics of how more generally applicable United States law would apply to the special situation of the Islands. According to the district court,

> it becomes clear, when the reference to "customs duties" in section 28(a) is . . . [read in the context of the other provisions of section 28] that the term "cus-

[23] Apart from customs duties, section 28(a) addresses: United States income tax; taxes levied by Congress on the inhabitants of the Islands; and quarantine, passport, immigration and naturalization fees collected in the Islands. Section 28(b) provides for a limited rebate of internal revenue taxes levied on "articles produced in the Virgin Islands and transported to the United States." (This provision is construed in the separate opinion also issued today in these consolidated cases. *See* note 3, *supra*.) Section 28(c) concerns an exemption from United States trademark law for certain goods imported into the Islands. Finally, section 28(d) imposed upon certain goods shipped from the Islands to the United States the same customs duties as are imposed on like goods imported from foreign countries.

> toms duties" must be interpreted to include those duties imposed on goods transported to the United States from the Virgin Islands.
>
> . . . .
>
> The focus throughout section 28 on internal revenue laws and other laws generally applicable to the Virgin Islands strongly suggests the conclusion that the reference in section 28(a) to "customs duties" was not intended to be limited to those duties imposed under local law on goods imported into the Virgin Islands.[24]

In addition, the district court reasoned that if Congress had intended to cover only customs duties locally collected it would have so specified, as it did in the case of quarantine, passport, immigration and naturalization fees. Finally, the district court cited the absence of any indication that Congress intended, either in 1954 or in enacting predecessor legislation, to restrict the covered customs duties to those locally collected.

The court rejected the defendants' argument based on settled administrative interpretation of predecessor law as follows:

> [S]ection 28 cannot properly be viewed as a mere reenactment of section 5 of the 1917 Act; the 1954 Revised Organic Act completely superseded any inconsistent provisions of the 1936 Organic Act and the 1917 Act. See *Virgo Corp.* v. *Paiewonsky*, 384 F.2d 569 (3d Cir. 1967), [*cert. denied*, 390 U.S. 1041 (1968)]. Thus, section 28(a) must be read on its own terms and cannot be presumed to have the same meaning as section 5 of the 1917 Act. In fact, the terms of section 28(a) are considerably different from those of section 5 of the 1917, Act and section 28(a) does not include the "in pursuance of this Act" clause relied on so heavily by the Comptroller of the Treasury in support of this narrow construction of section 5. Accordingly, whatever force the interpretation of the Comptroller and the Attorney General may origi-

[24] Memorandum, *supra* note 1, at 8–9, Islands App. at 128–29.

> nally have had, (and it appears to the Court that their interpretation disregards the clear meaning of section 5), that force has been essentially dissipated by the marked difference between the terms of section 28(a) of the 1954 Act and section 5 of the 1917 Act.[25]

Finally, the court rejected an argument that the rebate of duties on goods which were merely passed through the Islands would be "illogical." The court concluded:

> [I]t is [even] more illogical [to assert] that Congress intended to cover over only the meager customs duties levied on goods imported into the Virgin Islands. As discussed earlier, these goods traditionally have entered the Virgin Islands almost duty free, and the amount of revenues from duties imposed on such goods would be negligible. It would be surprising if Congress intended that only the insubstantial amount of duties collected on imports into the Virgin Islands be covered into the Virgin Islands Treasury.[26]

II. The Merits

As already noted,[27] section 28(a) of the 1954 Act requires, in pertinent part, that "the proceeds of customs duties . . . be covered into the treasury of the Virgin Islands . . . ." Literally read, this provision could require cover of *all* customs duties anywhere collected by the United States government.[28] The patent absurdity of such

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[25] *Id.* at 10, Islands App. at 130.

[26] *Id.* at 11, Islands App. at 131.

[27] Text preceding note 6, *supra*.

[28] The United States suggests that an absurd result be avoided by reading the phrase "collected in the Virgin Islands" to modify not only "quarantine, passport, immigration, and naturalization fees" but also "customs duties, . . . income tax . . . [and] taxes levied by the Congress on the inhabitants of the Virgin Islands." Brief for Appellant in Nos. 79-1021 & 79-1022 at 20-23. However, the particular phrasing and order of the provisions of section 28(a) of the 1954 Act follow those of Section

an interpretation mandates a closer examination of Congressional intent as revealed by the structure of the statute and its legislative history.

A. *The 1954 Act*

The district court found in section 28's focus on generally applicable United States law a design indicating that section 28(a)'s reference to "customs duties" should be read to include customs duties on goods shipped from the Islands to the mainland.

However, we do not agree that the lack of reference to other "local" taxes or duties in Section 28 evinces a purpose to cover non-local customs duties. Even apart from the cover provision's history, which we discuss below,[29] we think there is a sound reason for providing for cover of exclusively locally collected customs duties in a section which otherwise tailors generally applicable United States law to the Islands' situation. That is because duties imposed at entry in the Islands are collected by the United States customs service,[30] whose employees are required

35 of the 1936 Act, and in our view the 1936 Act is not susceptible of the reading suggested by the government.

Section 35 of the 1936 Act provided that

> the proceeds of customs duties, less the cost of collection, and the proceeds of the United States income tax, and the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands shall be covered into the treasury of the Virgin Islands . . . .

1936 Act, *supra* note 16, 49 Stat. at 1816. The interposition of the word "and" between the enumerated items in the 1936 Act makes it substantially more difficult to read "collected in the Virgin Islands" to modify each of the items listed and for this reason we reject the government's suggestion.

[29] *See* Part II(B), *infra*.

[30] Exec. Order 2620 (May 15, 1917) (placing administration of customs laws in the Islands under the control of the Secretary of

by generally applicable United States law to transmit the monies collected to the United States treasury.[31] Thus the provision's inclusion in section 28 would conform to the statutory scheme identified by the district judge, creating for the Islands a special exemption from generally applicable United States law.[32]

Moreover, even if we accepted the premise that section 28 was intended to fashion specific Islands application of general United States law, we would not be required from this to conclude that the customs duties cover was intended to equal the sum of local duties plus duties levied on goods entering the mainland by shipment from the Islands. Additional guidance would be necessary either to explain why the cover should not be more inclusive, given its vague language, or to explain why it should not be more limited, given section 28's focus on transactions with a more substantial connection with Islands' activities than merely a stopover in an Islands' port.

Like the district court, we find in the common elements of section 28's provisions some general guidance for the interpretation of section 28(a)'s reference to customs

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the Treasury). *See* 1936 Act, *supra* note 16, § 36, 49 Stat. at 1816 (Secretary of Treasury must appoint officers for administration of customs laws).

[31] 31 U.S.C. § 484 (1976) (requiring payment into United States treasury of "all moneys received from whatever source for the use of the United States").

[32] Moreover, customs duties directly affect international and inter-territorial relations and are thus markedly distinguishable from other "local laws." Under the 1936 Act, for example, local authorities could *not* legislate a change in local customs duties, although they were empowered to impose other taxes. *See* 1936 Act, *supra* note 15, § 36, 49 Stat. at 1816. The 1954 Act is ambiguous in this respect. *See* 1954 Act, *supra* note 3, § 8(c), 68 Stat. at 501. However, in Virgo Corp. v. Paiewonsky, 384 F.2d at 575–79 (alternate holding), the third circuit held that the Islands' legislature may enact export duties under the 1954 Act.

duties. The guidance we find, however, suggests that the "customs duties" included in cover to the Islands cannot be read as broadly as the district court held in its memorandum opinion.

An examination of certain common features of the provisions of section 28 will reveal the reasons for our conclusion. Section 28(a) covers into the Islands' treasury not only "customs duties" and "the proceeds of the United States income tax" but also "the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands." "Inhabitants of the Virgin Islands" are defined for purposes of the cover provision as those "persons whose permanent residence is in the Virgin Islands."[33] The definition of inhabitant for purposes of the cover of taxes levied on inhabitants and the specification of the situs of collection for purposes of the cover of quarantine, passport, immigration and naturalization fees demonstrates an intent, at least as to those fees and taxes, that the cover be limited to amounts collected which have some substantial nexus to the Islands. This obvious intent concerning two specific categories of items to be covered suggests an overarching design for the entire cover provision, a design with which more ambiguous categories should be read consistently.

The district court, applying a different principle of construction, would read Congress' inclusion of specific limitations on only certain categories of items covered to exclude by implication such or similar limitations on the other categories mentioned. Doing so, however, leaves us with no guidance concerning the interpretation of "customs duties," when guidance is needed to avoid an absurd result, *i.e.*, the cover into the Islands' treasury of all customs duties, anywhere collected.

[33] 1954 Act, § 28(a), 68 Stat. at 508.

The guidance we gather from the whole of section 28(a) would limit the items covered to those with some substantial nexus to the Islands. Customs duties levied upon goods entering the Islands would certainly meet such a test; Congress itself selected situs of collection as the determinative variable for purposes of cover of quarantine, passport, immigration and naturalization fees. The question remains, however, whether customs duties collected here on items shipped from the Islands have a substantial enough nexus with the Islands to require cover to the Islands' treasury.

The conclusion reached by the district court would require that cover to the Islands include duties levied on goods which merely pass through the Islands on their way to the mainland as well as duties levied on goods produced on the Islands and shipped here. However, certain other provisions of section 28 strongly suggest that Congress did not consider the mere passing through of goods enough of a nexus with the Islands to derive any advantage under the statute.

First, the limited "matching" rebate provision of section 28(b), discussed above, is restricted to internal revenue taxes "on articles *produced* in the Virgin Islands *and* transported to the United States" (emphasis supplied).[34] The language of the provision demonstrates an intent to exclude from rebate those taxes collected on items that are merely shipped from elsewhere through the Islands to the mainland. Second, section 28(d) provides for an exemption from customs duties and from certain internal revenue taxes for a good shipped from the Islands only if the good were grown or produced in the Islands and only if the total contribution of foreign materials to the good's value were fifty percent or less.[35] In other words, even goods whose

[34] *Id.*, § 28(b).

[35] *Id.*, § 28(d). This provision appears to represent both an incentive to Islands' industry and an attempt to protect mainland industry from unfair Islands' competition owing to the lower

value derived by more than fifty percent from Islands' materials and which were shipped from the Islands were not given the benefit of the customs duty exemption unless they were also "produced" on the Islands. Thus, the language of the statute itself suggests that Islands' production of the article might be an appropriate test of nexus for determining those customs duties to be covered and those to be retained.

We recognize that such a test strains the barren language of the statute somewhat more than a distinction based strictly on situs of collection. Such a test would, after all, require for its implementation a fairly elaborate administrative mechanism both to make the necessary inquiries concerning the place of the goods' production and to record this information for purposes of assessing the "cover." Unlike section 28(d), section 28(a) includes no express signal to the administrator that such an administrative mechanism will be required. A distinction based purely on situs of collection seems simpler to implement since one would reasonably assume that the information necessary to determine the cover could be obtained through available records independently compiled in the Islands and on the mainland.

Nevertheless, were we to have approached the question of statutory interpretation unencumbered by years of administrative practice under the 1954 Act that is consistent both with the Secretary's position in this court and with administrative interpretation of predecessor law or had we reason to believe that Congress has not been made aware of current or previous administrative practice and interpretation or were there an indication in the legislative history of the 1954 Act that administrative practice in this respect was to be altered, we might have looked with

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import duties paid by Islands industry on foreign materials. Standing alone it neither supports nor undermines the Islands' argument that a rebate of duties levied on non-exempt goods is required under section 28(a).

favor upon a construction of the statute which would have required cover to the Islands of customs duties levied upon goods produced in the Islands. However, the administrative, statutory and legislative history of the 1954 Act does not permit us this latitude.

B. *Statutory, Administrative and Legislative History*

As noted earlier,[36] administrative practice both before and after enactment of the 1954 Act has been to consistently withhold cover of customs duties levied on goods entering this country from the Virgin Islands. An erroneous administrative interpretation would not necessarily be saved by persistent administrative adherence to that interpretation and the district court, in rejecting the Secretary's emphasis on administrative practice, pointed to the lack of any evidence to show that Congress ever meant to limit the term "customs duties" to those locally collected. We think the more appropriate inquiry, however, is whether there was anything in the 1954 Act or its legislative history to show an intent to change an administrative course which, while not totally unopposed, nonetheless had been followed for more than thirty years before the 1954 Act was passed.

In our view, administrative interpretation and practice is controlling here for three reasons. First, the customs duties cover provision of the 1954 Act was taken from a bill proposed by the Interior Department,[37] which was

[36] Text at notes 11-17, *supra*.

[37] S. 2321, 83d Cong., 1st Sess. § 26(a) (1953); H.R. 5181, 83d Cong., 1st Sess. § 26(a) (1953). S. 2321 was contemporaneously identified by the Department of the Interior as "the Department bill," Letter from Orme Lewis, Assistant Secretary of the Interior to Hugh Butler, Chairman of the Senate Committee on Interior and Insular Affairs (Nov. 30, 1953), *reprinted in* S. REP. NO. 1271, 83d Cong., 2d Sess. 13 (1954). H.R. 5181 and S. 2321 are identical. H.R. 5181, introduced "by request" by the Chairman of the House Committee on Interior and Insular Af-

vested by the 1936 Act and by executive order with substantial supervisory responsibility over the Islands[38] and whose own Secretary, thirteen years earlier, had registered with the Justice Department an official objection to the continuing failure to cover mainland duties.[39] Second,

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fairs on May 13, 1953, 99 CONG. REC. 4904, was in fact the same bill submitted to the Speaker of the House by the Interior Department six days earlier. H.R. REP. NO. 1603, 83d Cong., 2d Sess. 18 (1954); 99 CONG. REC. 8172 (1953) (remarks of Sen. Butler) (identifying H.R. 5181 as bill proposed by the Interior Department).

Comparison of the Interior Department's proposed bill with the two other bills under active Committee consideration at the time reveals that the relevant text of the cover provision ultimately enacted was taken from the Interior Department's bill. With the exception of two provisos added by the Committee, the cover provision of the 1954 Act is identical to that proposed by the Interior Department and substantially different from that proposed by the Chamber of Commerce of the Virgin Islands, S. 2322, 83d Cong., 1st Sess. (1953); H.R. 5608, 83d Cong. 1st Sess. (1953), and by the Legislative Assembly of the Virgin Islands, S. 2323, 83d Cong., 1st Sess. (1953); H.R. 5835, 83d Cong., 1st Sess. (1953). In its report the Senate Committee acknowledged that "[m]ost of [the] provisions [in the reported bill were] adapted from one or the other of the bills before the committee . . .." S. REP. NO. 1271, 83d Cong., 2d Sess. 1 (1954). *Accord*, H.R. REP. NO. 1603, 83d Cong., 2d Sess. 11 (1954).

[38] 1936 Act, *supra* note 16, § 20, 49 Stat. at 1812 (Islands governor must make reports to Interior Department); *Id.*, § 23, 49 Stat. at 1813 (Secretary of Interior may appoint executive and administrative officers); *To Provide a Civil Government for the Virgin Islands of the United States: Hearing on H.R. 11751 Before the House Comm. on Insular Affairs*, 74th Cong. 2d Sess. 18 (1936) (statement of Arnold M. Golden) (advising against express provision in Organic Act for Interior Department control of Islands); Exec. Order No. 5556 (Feb. 27, 1931) (placing Islands administration under supervision of Secretary of Interior pending entrance on duty of civil governor).

[39] *See* note 17, *supra*.

the applicable language as drafted and as enacted is substantially similar to that of the 1936 Act in effect when the Interior Department made its objections in 1941[40] and, although the Interior Department's draft[41] and the 1954 Act[42] expressly addressed a different aspect of Interior's 1941 objections (cover of internal revenue taxes), nothing in the proposed or enacted statute indicates a comparable intention to depart from settled administrative practice concerning the cover of customs duties. Third, nothing in the legislative history suggests that Congress meant to change the practice that prevailed as a result of consistent administrative interpretation of the earlier acts.

We recognize that a primary concern of the 1954 Act was to advance the Islands' self sufficiency and local autonomy[43] and that this concern is consonant with an interpretation of the Act to require the cover of mainland duties.[44] However, we cannot believe that so dramatic a change to the benefit of the Islands would be made without debate or even comment within the contours of an act where fiscal concerns weighed so heavily[45] and an innovative matching scheme for certain internal revenue taxes was featured so prominently.[46] There is, in fact, a hint

[40] *See* note 16, *supra*.

[41] S. 2321, *supra* note 37, § 26(b); H.R. 5181, *supra* note 37, § 26(b).

[42] 1954 Act, *supra* note 1, § 28(b), 68 Stat. at 508.

[43] *See* S. REP. NO. 1271, 83d Cong., 2d Sess. 4–5 (1954).

[44] The district court reasoned, "It would be surprising if Congress intended that only the insubstantial amount of duties collected on imports into the Virgin Islands be covered into the Virgin Islands Treasury." Memorandum, *supra* note 3, Islands App. at 131.

[45] *See* S. REP. NO. 1271, 83d Cong., 2d Sess. 4–6 (1954).

[46] An important aspect of the fiscal provisions of the Department of the Interior's bill was a proposal to rebate the full amount of certain internal revenue taxes collected here on Islands' goods (*See* the separate opinion, *supra* note 3, issued

that previous administrative practice was to be perpetuated. Addressing the proposed internal revenue tax cover, the Senate Report noted that under the law then in effect "all customs and import duties" were covered into the insular treasuries.[47] Since the only customs duties then being covered were those locally collected, this notation suggests that "customs . . . duties" were understood by the committee to mean only customs duties locally collected. With this understanding as a basis, the similarity in language between the 1954 Act and the 1936 Act is thus even more suggestive of an intent to perpetuate prior practice.

Taken as a whole, the history of the 1954 Act indicates no intention, express or reasonably to be inferred, that Congress proposed to change the practice of covering over only local duties. For this reason, we vacate the district court's judgment and remand with directions to enter judgment in favor of the United States. Because of our

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today in these consolidated appeals). S. 2321, *supra* note 37, § 26(b); H.R. 5181, *supra* note 37, § 26(b). Although Congress responded favorably to this idea, the rebate proposal was trimmed considerably by imposition of the matching scheme ultimately enacted. *See* 1954 Act, *supra* note 3, § 28(b), 68 Stat. at 508; H.R. REP. NO. 1603, 83d Cong., 2d Sess. 13-14 (1954); S. REP. NO. 1271, 83d Cong., 2d Sess. 5 (1954):

> To remedy this situation [the Islands' dependence on Congressional "handouts"], the committee has worked out a limited return or grant of the internal revenue taxes on Virgin Islands products. For every dollar of local revenue, including Federal income taxes, which the people of the islands raise, a dollar of the internal revenue taxes on Virgin Islands products would be granted to them, automatically.

This careful and not completely generous approach is hardly consistent with an unqualified reversal *sub silentio* of the longstanding practice of retaining in the United States treasury customs duties collected here on Islands' shipments.

[47] *Id.* at 4.

disposition of this issue we do not reach the question whether an oil import license fee should be treated as a customs duty for purposes of assessing the amount to be covered into the Islands treasury under the 1954 Act.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1020

COMMONWEALTH OF PUERTO RICO

v.

W. MICHAEL BLUMENTHAL, Secretary, Department of the Treasury, APPELLANT

No. 79-1021*

VIRGIN ISLANDS

v.

W. MICHAEL BLUMENTHAL, Secretary, Department of the Treasury, APPELLANT

No. 79-1024

COMMONWEALTH OF PUERTO RICO, APPELLANT

v.

W. MICHAEL BLUMENTHAL, Secretary, Department of the Treasury

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*In this opinion, we address that portion of No. 79-1021 dealing with the covering over of revenues derived from the taxation of gasoline refined in the Virgin Islands and transported to the United States. In a companion opinion issued simultaneously herewith, we dispose of another portion of No. 79-1021, the customs duties issue unique to the Virgin Islands case.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 75-1035 & 76-0916)

Argued November 16, 1979

Decided October 17, 1980

Ernest J. Brown, Attorney, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General, and *David English Carmack*, Attorney, Department of Justice, were on the brief for the Secretary of the Treasury as appellant.

Michael J. Henke, with whom *Charles D. Tetrault*, was on the brief for the Commonwealth of Puerto Rico as appellee and cross-appellant.

Milton Eisenberg, with whom *Theodore C. Hirt* and *Ive Arlington Swan*, were on the brief for the Virgin Islands as appellee in case No. 79-1021.

Myron C. Baum also entered an appearance for the Department of Justice.

Before McGOWAN and WALD, *Circuit Judges*, and JOHN PRATT,** *United States District Judge* for the District of Columbia.

Opinion for the court filed by *Circuit Judge* McGOWAN.

McGOWAN, *Circuit Judge*: These consolidated appeals present a substantial controversy between the United States, on the one hand, and Puerto Rico and the Virgin Islands, on the other, with respect to the proper disposition of revenues derived from a tax of 4 cents per gallon imposed by the United States on the initial sale of gasoline in the United States by a producer or importer. 26 U.S.C.

** Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

§ 4081(a) (1976). Each of the island governments asserts that Congress has directed that such revenues in respect of gasoline manufactured in the islands and transported to the United States should be paid over to them. The District Court upheld that contention. We reverse.

I

In 1898, the United States acquired Puerto Rico from the government of Spain pursuant to the Treaty of Paris, which ended the Spanish-American War. Treaty of Paris, Apr. 11, 1899, United States-Spain, 30 Stat. 1754. Soon after, Congress enacted the Foraker Act, also called the First Organic Act, 31 Stat. 77 (1900), which set up a provisional domestic government in Puerto Rico and provided revenues for the island's support. H.R. Rep. No. 249, 56th Cong., 1st Sess. 1-16 (1900). In order to aid the growth of Puerto Rican industries and professions, Congress provided in section 14 of the Foraker Act that "the internal revenue laws . . . in view of the provisions of section three, shall not have force and effect in Porto Rico." Foraker Act, § 14, 31 Stat. 77, 80 (1900). In section 3, however, Congress limited this exemption by subjecting articles manufactured in Puerto Rico and shipped to the United States to a permanent tax "equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture." Foraker Act, § 3, 31 Stat. 77 (1900). The Act did not mandate any special treatment of these tax revenues, and all were retained by the United States Treasury.

In 1917, Congress passed the Second Organic Act *eo nomine* the Jones Act, 39 Stat. 951 (1917), which provided, *inter alia*, "[t]hat hereafter all taxes collected under the internal revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed in the island *shall be covered into the treasury of Porto Rico.*" Jones Act, § 9, 39 Stat. 951 (current version at 26 U.S.C. § 7652(a)(3) (1976)) (em-

phasis added).[1] This cover over provision was enacted as part of the Puerto Rican Federal Relations Act of 1950, Pub. L. No. 600, 64 Stat. 319 (48 U.S.C. § 734), and is also codified at 26 U.S.C. § 7652(a)(3) (1976), the tax statute upon which Puerto Rico bases its claim.

Since the passage of the Jones Act, the United States Treasury has consistently covered over into the treasury of Puerto Rico revenues from manufacturer's excise taxes on liquor and tobacco produced in Puerto Rico and transported to the United States. During 1977 alone the revenues covered over totaled approximately $9 million in tobacco tax revenues and $134 million in liquor tax revenues (App. 297–98).

During fiscal year 1956–57 Puerto Rican manufacturers began to refine and ship gasoline to the United States. Upon sale, this gasoline was subject to a tax that has been levied since 1932 on all gasoline "sold by a producer or importer" in the United States. Revenue Act of 1932, § 617, 47 Stat. 169 (1932) (current version at 26 U.S.C. § 4081(a) (1976)). None of the revenues derived from gasoline manufactured in Puerto Rico and shipped to the United States have ever been covered over to Puerto Rico. The Secretary of the Treasury estimates that approximately $350,000,000 in tax revenues have been collected on Puerto Rican gasoline since 1956 (App. 213).

On September 13, 1974, the Governor of Puerto Rico wrote to the Secretary of the Treasury, requesting that both past and future tax revenues on gasoline produced in Puerto Rico and transported to the United States be cov-

[1] The spelling was then "Porto Rico." It was changed to "Puerto Rico" by the Joint Resolution of May 17, 1932, 47 Stat. 158 (1932). The phrase "covered into" means, literally, "deposited into." In practical terms, the provision requires the United States to rebate to the Puerto Rican treasury the same amount of funds as it collected through taxation of Puerto Rican articles in the above-described circumstances.

ered over into the treasury of Puerto Rico (App. 15). After exchanging letters and legal memoranda regarding the cover over provision, the parties could not agree, and the Secretary formally rejected Puerto Rico's claim on June 10, 1975 (App. 59).

Puerto Rico brought suit in the District Court, seeking declaratory relief, mandamus, an injunction against future retention of the gasoline tax revenues, and an accounting of all sums unlawfully withheld in the past. *Commonwealth of Puerto Rico v. Blumenthal*, No. 75–1035 (D.D.C. Oct. 10, 1978). On October 10, 1978, the District Court granted partial summary judgment. The court held that Puerto Rico is entitled to all tax revenues henceforth collected on gasoline manufactured in Puerto Rico and transported to the United States, but limited Puerto Rico's recovery of the past tax revenues to those collected after September 13, 1974, when Puerto Rico first informed the Secretary of the Treasury of its claim. *Id.* at 15–18. The court reasoned that Puerto Rico had "slept on its rights" and therefore was barred from full recovery by the equitable doctrine of laches.[2]

The facts of the Virgin Islands case are essentially the same. The Virgin Islands were acquired from Denmark pursuant to the Treaty of August 4, 1916, United States-Denmark, 39 Stat. 1706. On March 3, 1917, Congress passed an act providing for government of the Virgin Islands. Act of March 3, 1917, 39 Stat. 1132 (1917). Included was a tax provision analogous to section 3 of the Foraker Act. In its current form, the Virgin Islands equalization tax statute provides in pertinent part:

> *Taxes imposed in the United States.* — Except as provided in section 5314, there shall be imposed in the

[2] In Nos. 79-1020 & 1021, the United States appeals the District Court's grant of partial summary judgment. In No. 79-1024, Puerto Rico cross-appeals the District Court's application of the doctrine of laches to prevent Puerto Rico's recovery of all taxes ever levied on Puerto Rican gasoline.

> United States, upon articles coming into the United States from the Virgin Islands, a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture.

26 U.S.C. § 7652(b)(1) (1976). The Internal Revenue code now provides for cover over of a certain percentage of

> all taxes imposed by, and collected during the fiscal year under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States.

26 U.S.C. § 7652(b)(3) (1976).

In 1966, the Virgin Islands began to refine gasoline for sale in the United States. All such gasoline sold in the United States was taxed pursuant to the same gasoline tax, 26 U.S.C. § 4081(a) (1976), at issue in the Puerto Rico case. The United States Treasury neither covered over these funds nor set up a special fund for the benefit of the Virgin Islands. The Virgin Islands sued seeking, among other relief, (1) a declaratory judgment that the gasoline excise tax revenues collected by the Treasury since 1966 should be covered into the treasury of the Virgin Islands, and (2) payment of all future taxes and all past taxes wrongfully withheld. *Virgin Islands v. Blumenthal*, No. 76-0916 (D.D.C. Oct. 11, 1978). The District Court granted the Virgin Islands' motion for summary judgment.

Four appeals in all were consolidated for hearing and disposition. Nos. 79-1020 & 1024 are the cross-appeals involving the gasoline tax issue with respect to Puerto Rico. Nos. 79-1021 & 1022 are the cross-appeals involving both the gasoline tax and customs duties issues with respect to the Virgin Islands.

This opinion deals with the gasoline tax questions as to both Puerto Rico and the Virgin Islands. A companion opinion issued simultaneously herewith disposes of the customs duties problems which are confined to the Virgin Islands. We consider the gasoline tax questions together because the cover over statute upon which the Virgin Is-

lands rely is in all essential aspects identical to that of Puerto Rico, and almost certainly was consciously patterned after the Puerto Rico provision. *See* S. Rep. No. 1271, 83rd Cong., 2d Sess. 4 (1954); S. Rep. No. 476, 80th Cong., 1st Sess. 2–3 (1947). The District Court, as well as the parties themselves, focused on the Puerto Rico cover over provision throughout the litigation and assumed that an interpretation of the meaning of the Puerto Rico cover over provision determines the meaning of the other provision as well. *Virgin Islands v. Blumenthal*, No. 76–0916 (D.D.C. Oct. 11, 1978), slip op. at 2. We adopt this approach, and assume that an interpretation of the Puerto Rico statute is applicable to the Virgin Islands statute as well.

II

The District Court held that the cover over provision by its terms is all-inclusive and should be interpreted broadly, not limited only to Foraker Act taxes. The court read the cover over provision to require the covering over to Puerto Rico of all taxes on all articles produced in Puerto Rico and transported to the United States, without regard to which statutory provision imposes the tax. But, the court found further, even under the narrower view of the cover over provision espoused by the United States, the gasoline tax revenues must be covered over because the gasoline tax is in all respects similar to the liquor and tobacco taxes, the revenues from which have traditionally been covered over. We conclude, however, that the United States correctly withheld the gasoline tax revenues, and that the District Court erred in ordering the United States to cover over these funds.

This case abounds in ambiguities, as the Government readily admits. It may be useful, therefore, to precede the detailed discussion that follows with a brief summary of the considerations we believe to be determinative.

In 1901 the Foraker Act dealt generously with Puerto Rico by exempting it generally from United States taxation. In the course of doing so, however, Congress recognized that mainland manufacturers subject to an excise tax on manufacture would be unfairly disadvantaged if Puerto Rican manufacturers making the same product were not subject to an equivalent tax. To equalize the competitive positions of the two, the Foraker Act provided that articles made in Puerto Rico and sent to the mainland market should be subject to an excise tax on manufacture at the same rate as that laid in respect of mainland manufacturers. Thus, for example, Puerto Rican manufacturers of cigars and spirits would have to pay an excise tax on those goods in the same way and in the same amount as a mainland cigar maker and distiller was required to pay.

For many years these excise taxes collected on Puerto Rican products were retained in the United States Treasury. When Congress passed the Jones Act in 1917, it decided, in order to ease the financial plight of Puerto Rico, to cover over these excise taxes collected in Puerto Rico into the Puerto Rican Treasury.

In 1956 the refining of gasoline first began in Puerto Rico. But there was not then, nor has there been since, any excise tax imposed by the United States on the manufacture of gasoline. In contrast with a distiller who becomes liable for a tax when whiskey comes into being, no tax is levied upon gasoline until it is first sold by the producer or the importer. Thus, Puerto Rican and mainland gasoline meet in the market on equal terms, and there is no occasion to equalize their competitive positions by taxing the manufacture of gasoline in Puerto Rico. There being no such tax, there is nothing to cover over into the Puerto Rican Treasury in respect of gasoline.

In so holding, we reach two conclusions: (1) that Congress intended to cover over only those taxes laid for equalization purposes, and (2) that the gasoline tax statute is not such a tax. We examine each such conclusion in turn.

III

We consider, first, the linkage *vel non* of the cover over provision and the Foraker Act taxation provision. The cover over statute at issue provides:

> All taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States (less the estimated amount necessary for payment of refunds, and drawbacks), or consumed in the island, shall be covered into the treasury of Puerto Rico.

26 U.S.C. § 7652(a)(3) (1976). We begin by observing that the cover over provision is *not* clear and unambiguous, contrary to the District Court's assertion.[3] Rather, the cover over provision is replete with ambiguities requiring recourse to traditional methods of statutory construction.[4]

Primary among these ambiguities is the meaning of the phrase "all taxes" in the context of the cover over provision. Interpreted literally, the statute requires the covering over of all tax revenues ever collected when an article from Puerto Rico later becomes the subject of a taxable transaction in the United States: this would require the covering over even of estate and gift taxes levied years after the article entered the United States and mixed with domestic goods in the general market.

The administrative problems inherent in such a reading of the cover over provision are truly staggering. To effectuate this interpretation, Congress would have to separate Puerto Rican goods from other articles before sale, after sale, and throughout the useful life of the article, or else

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[3] Commonwealth of Puerto Rico v. Blumenthal, No. 75-1035 (D.D.C. Oct. 10, 1978), slip op. at 8-11.

[4] These include the legislative history, administrative constructions, and policies underlying the statutory language. *Cf.* United Steelworkers of America v. Weber, 443 U.S. 193, 200-209 (1979).

develop tracing procedures for every type of article that Puerto Rico transports to the United States. Both scenarios are so impossible, both of conception and of practical application, as to render such a broad interpretation ridiculous. Indeed, even Puerto Rico admits that such an interpretation is "absurd." Brief for Appellee at 5–6 n.7. We must conclude that the phrase "all taxes" is, in the context of a cover over statute, ambiguous, requiring some form of modification or limitation.[5]

Given this initial ambiguity, the modifying phrase "on articles produced in Puerto Rico and transported to the United States" assumes crucial importance, yet it too is ambiguous. It is unclear from the language of the statute whether this phrase describes the taxable event—taxes laid primarily because the article is produced in Puerto Rico and transported to the United States—or instead is intended to describe a class of articles, all or some of the taxes upon which must be covered over into the island treasury. The scope of the cover over provision varies tremendously with the meaning of this phrase.[6] Yet, on its face, the phrase is susceptible to either interpretation.

[5] *See* Kananen v. Matthews, 555 F.2d 667 (8th Cir.), *cert. denied*, 434 U.S. 939 (1977) [courts have some scope for adopting a restricted rather than a literal reading of statute's words when the literal meaning would lead to absurd results]; Organized Migrants in Community Action v. Brennan, 520 F.2d 1161, 1166 (D.C. Cir. 1976) ["literal meaning will not be followed when it appears that to do so would, in view of the purpose of that statute, lead to an absurd or unjust result"]; International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 518 F.2d 913, 921 (9th Cir. 1975) [reference to legislative history is appropriate when the statutory language is ambiguous or where a literal interpretation would thwart the overall statutory scheme].

[6] If the phrase modifies "all taxes," limiting the taxes to those with the *taxable event* of production in Puerto Rico and transportation to the United States, then it follows logically that the cover over provision applies to Foraker Act taxes. A Foraker

Contrary to the District Court's holding, then, we find that the cover over provision is highly ambiguous. We therefore must resort to the traditional statutory interpretation aids, such as legislative history and administrative construction, in order to determine the scope of the cover over provision.

A. *Legislative History*

The legislative histories of the Foraker and Jones Acts show that the two provisions at issue were enacted at different times for apparently different purposes. Nevertheless, this by no means renders the two provisions unrelated or contradictory. On the contrary, the legislative histories of both provisions indicate that the two are interrelated; in fact, the cover over provision is most logically explained as an outgrowth of the Foraker "equalization tax" provision.

1. *The Foraker Act*

The Foraker Act, 31 Stat. 77 (1900), was Congress's first attempt to provide a government and economic struc-

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Act tax is laid whenever an article transported from Puerto Rico into the United States to compete with other similar goods has escaped a tax laid on similar domestic goods and will operate in the mainland market at an unfair commercial advantage absent the levying of an equal tax. Several conditions must be met, one of which is necessarily an article's production in Puerto Rico (so that it escapes a tax purely by virtue of its origin) and its transportation to the United States (so that it stands to compete with taxed domestic goods). *See* text accompanying notes 9–11 *infra*.

If, however, the phrase modifies "all taxes" only insofar as it describes a class of articles, all of the taxes on which are to be covered over into Puerto Rico, nothing in the statute on its face suggests that the gasoline tax revenues should escape cover over.

ture for the newly acquired territory of Puerto Rico.[7] Most important of the Foraker Act provisions, for purposes of this case, was the imposition of a permanent tax in section 3. Section 3 provided, in relevant part, for the

> (imposition) upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn from consumption or sale . . . [of] a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture; . . . and on all articles of merchandise of United States manufacture coming into Porto Rico . . . [of] a tax equal to the internal revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture.

Foraker Act, § 3, 31 Stat. 77 (1900) (current versions at 26 U.S.C. §§ 7652(a)(1) and 7653 (1976)). No special treatment of the revenues collected under this tax was required by the Foraker Act, and until 1917 all revenues collected pursuant to the provision were retained by the United States Treasury.[8]

This provision can accurately be termed an "equalization tax," because it was enacted to plug a loophole created by Congress's decision, in section 14 of the Foraker Act, to exempt Puerto Rico from the internal revenue laws of the United States.[9] As Representative Payne, Chairman of

[7] For a general discussion of its purposes, see H.R. Rep. No. 249, 56th Cong., 1st Sess. 1-6 (1900); 33 Cong. Rec. 1944, 2477 (1900).

[8] Another portion of section 3 required the United States to hold revenues from certain temporary customs duties for the benefit of Puerto Rico, but only until the President of the United States issued a proclamation creating a local government and system of taxation for Puerto Rico, at which time the duties ceased. *See also* H.R. Rep. No. 77, 64th Cong., 1st Sess. 1-2 (1916); H.R. Rep. No. 2945, 59th Cong., 1st Sess. 2 (1906).

[9] Section 14 of the Foraker Act provided that the internal revenue laws of the United States should not be applicable in

the Committee reporting the bill, explained on the floor of the House:

> [i]t occurred to me at once that if we allowed Puerto Rico cigars to come in here without paying an internal-revenue tax, it placed our people at a disadvantage. Our manufacturers would have to pay the 25 per cent of the duties . . . and in addition they would have to pay the internal revenue tax. I thought the Cigar Makers' Union had a just grievance against the proposition.

33 Cong. Rec. 1944 (1900). *See also* 33 Cong. Rec. 2477, 3515 (1900) (remarks of Sen. Foraker). Representative Payne alluded specifically to the manufacturer's excise tax on tobacco, which was imposed only on tobacco produced in the United States or imported into the United States from a foreign country. By excluding Puerto Rico from the internal revenue laws, Congress had held, in effect, that Puerto Rican tobacco was neither domestic nor foreign, and therefore would escape tax absent the Foraker Act tax.

This interpretation of the tax provision pervades the legislative history of the Foraker Act. As was stated in the Committee Report accompanying the bill, "The last provision [section 3] is necessary in order that our manufacturers of cigars and spirits may be at no disadvantage on account of the low tariff between Puerto Rico and the United States, on account of our internal revenue laws." H.R. Rep. No. 249, 56th Cong., 1st Sess. 1-2 (1900). This reading was also adopted by the Supreme Court in *Jordan v. Roche*, 228 U.S. 436, 443 (1913), in which the Court stated that "[t]he purpose of the Foraker Act was the

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Puerto Rico. As the Government noted in its brief on appeal, "The Congress believed that the excise taxes that then characterized the internal revenue system of the United States would unduly burden the people of Puerto Rico." Brief for Appellant at 23. *See* H.R. Rep. No. 249, 56th Cong., 1st Sess. 16 (1900).

equal taxation of Porto Rican articles and domestic articles."

It is most important that we define clearly the scope of the Foraker taxation provision now codified at 26 U.S.C. § 7652(a)(1) (1976), since the ultimate disposition of this suit turns on whether the tax laid on gasoline shipped from Puerto Rico to the United States since 1956 was levied pursuant to the Foraker tax provision or to 26 U.S.C. § 4081(a) (1976). Fortunately, the legislative history of the Foraker Act allows us to draw three unequivocal conclusions regarding the statute's purpose and scope.

First, the Foraker tax provision functions purely as an "equalization" provision. This is clear from both the purpose and the form of the statute. It was intended to equalize competition in those situations in which a Puerto Rican article being transported into the mainland market would have escaped a tax laid on similar domestic goods purely because of the peculiar tax status of Puerto Rico. Thus, the equalization tax comes into play not because of the manufacture, importation, or sale of the article—the usual taxable events found in tax statutes—but because of the existence of some domestic tax which, due to Puerto Rico's exemption from tax, reaches articles produced on the mainland but does not reach comparable goods in Puerto Rico. That the Foraker tax provision is triggered by the levying of some domestic tax threatening to skew competition is reflected in the form of the statute. It requires the imposition of a tax "equal" to one imposed in the United States on similar domestic goods.

A second precondition is apparent from the purpose of the statute and is reflected in the statutory language: the domestic tax must be laid at some point in the commercial cycle when the Puerto Rican article is exempt from United States tax. The Internal Revenue Service ("IRS") has interpreted this to mean that the domestic tax must be laid on the act of manufacture. *See* O'Connell letter, III-B *infra*. Congress's focus on the liquor and alcohol taxes

(both manufacturer's excise taxes) further strengthens the assumption that the domestic tax at issue will generally be a tax on manufacture, because such taxes clearly fail to reach articles of Puerto Rican manufacture.[10]

Third, the article must be manufactured in Puerto Rico and shipped to the United States for sale. The equalization tax was intended to apply only where an anticompetitive situation might be created due to a domestic tax, and this can only occur when the Puerto Rican article is brought into competition with the taxed domestic article.

On the basis of the statute's legislative history and language, then, we read the Foraker Act as imposing an equalization tax, as a condition of entry into the mainland market, on any Puerto Rican article that has escaped a tax previously laid on comparable American-made articles. Only when this equalization function is needed does the Foraker provision come into play. Furthermore, as far as we can discern, only domestic taxes on manufacture require such equalization. Any tax that applies equally to Puerto Rican and mainland goods, such as a tax on sale, does not require the application of a "mirror-like" equalization tax. It is primarily on the basis of this conclusion, that the Foraker provision imposes an equalization tax, that we eventually conclude that the gasoline tax revenues at issue need not be covered over.[11]

[10] We do not, however, foreclose the possibility that some tax other than a tax on manufacture exists requiring the application of a Foraker tax. We can think of no such example, but that does not mean that some future legislative enactment may not fit this description.

[11] The question arises whether this interpretation of the Foraker tax, as an "equalization tax," does not in fact nullify the charitable attempt to ease tax burdens on Puerto Rico through the blanket exemption in section 14. In fact, it does not. The Foraker tax does not come into play in a wide variety of situations; it applies only to taxes on articles shipped to the United States. Puerto Rican manufacturers who sell their wares locally

2. *The Jones Act*

The cover over provision, now codified at 26 U.S.C. § 7652(a)(3) (1976), was first enacted in 1917 as section 9 of the Jones Act, also termed the Second Organic Act, 39 Stat. 951, which dealt principally with the civil government and trade relations of Puerto Rico. H.R. Rep. No. 77, 64th Cong., 1st Sess. 1-2 (1916). As originally phrased, the statute provided:

> That hereafter all taxes collected under the internal-revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed in the island shall be covered into the Treasury of Porto Rico.

Jones Act, § 9, 39 Stat. 951 (1917).

The purpose of the cover over provision becomes clear within its historical context. Puerto Rico, a small, resource-poor island, was then, as now, dependent on imports for its necessities. In the years preceding the First World War, Puerto Rico imported European goods upon which it could impose customs duties. With the outbreak of the war, however, trade with Europe was disrupted and Puerto Rico was forced to rely on duty-free imports from the United States, losing a tremendous amount of revenue as a result. H.R. Rep. No. 77, 64th Cong., 1st Sess. 1-2 (1916). To remedy this situation, Congress enacted the cover over provision. As the House Committee on Insular Affairs noted, "The loss of this revenue has seriously embarrassed the Porto Rican Government, and it is believed to be but just and fair that it should receive the internal revenue taxes collected upon its products." *Id.*

3. *Linkage of the Two Provisions*

As to the general purposes of the two provisions, the parties herein do not disagree. The scope of the cover over

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are exempt from taxation by the United States (though still liable for taxation by Puerto Rico). Also, the Foraker Act did not lift the exemption from taxes on occupations, only from taxes on *articles transported*.

provision, however, is hotly disputed and represents the major question for our determination.

The District Court argued that Congress, recognizing Puerto Rico's precarious economic situation, intended the cover over provision to be broad. The court cited language in the legislative history of the Jones Act wherein the Senate Committee on Pacific Islands and Porto Rico ascribed a broad charitable purpose to the cover over provision and noted that the provision should be "all inclusive." S. Rep. No. 579, 64th Cong., 1st Sess. 2 (1916). From this, the court concluded that Congress intended to cover over more than just equalization taxes. *Commonwealth of Puerto Rico v. Blumenthal*, No. 75-1035, at 9-11.

The United States argues from the same language that Congress intended the cover over provision to apply to all equalization taxes, but to no other taxes. We find the United States's argument the more convincing in four respects.

First, the original drafted form of the cover over provision indicates Congress's assumption that only equalization tax revenues would be affected by the cover over provision. Although the cover over provision currently stands alone as 26 U.S.C. § 7652(a)(3) (1976), in its original drafting it was phrased as a *proviso* to another portion of the Jones Act:

> That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, *except the internal-revenue laws: Provided, however*, that hereafter all taxes collected under the internal-revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed in the island shall be covered into the treasury of Porto Rico.

39 Stat. 951 (emphasis added).

On its face, this is an odd construction, since the cover

over provision is apparently an extension of the favorable treatment of Puerto Rico implicit in its exemption from the internal revenue laws (App. 88). This construction makes sense only if an assumption is read in: that the cover over proviso refers to the equalization taxes, which truly do limit the benefits Puerto Rico derives from the exemption. Once this is assumed, the linkage of the exemption and the cover over provision becomes quite logical: Congress decided to limit the blanket exemption by imposing equalization taxes and by rebating those revenues to the Puerto Rican government, not to the people directly.

This interpretation is strengthened by the restatement, in the Jones Act, of the blanket exemption first passed as Section 14 of the Foraker Act. The Foraker Act originally provided that "the internal revenue laws . . . *in view of the provisions of section three* [the Foraker tax provision], shall not have force and effect in Puerto Rico." Foraker Act, § 14, 31 Stat. 77, 80 (1900) (emphasis added). That Congress restated this provision in the Jones Act suggests that the new exemption was also enacted "in view of" the Foraker tax.

Equally as telling is the legislative history accompanying the Jones Act. In explaining the addition of a cover over provision to the previously enacted exemption, the House Committee on Insular Affairs stated:

> It appears that the present rule is to pay into the Porto Rican treasury those taxes that are collected under the internal-revenue laws of the United States on articles produced and used in Porto Rico, and into the Treasury of the United States internal-revenue taxes collected on articles produced in Porto Rico but transported to the United States.

H.R. Rep. No. 77, 64th Cong., 1st Sess. 1-2 (1916). This describes, albeit rather inaccurately, the treatment of

taxes collected pursuant to the equalization tax provision.[12] The Committee report then continued:

> In the opinion of your committee *these taxes* should all be covered into the treasury of Porto Rico . . . The customs duties collected in Porto Rico have fallen off in the last three or four years . . . The loss of this revenue has seriously embarrassed the Porto Rican Government, and it is believed to be but just and fair that it should receive the internal-revenue taxes collected upon its products, whether those products are used in Porto Rico or produced in Porto Rico and transported and used in the United States.

Id. (emphasis added). The Committee clearly referred to the Foraker equalization taxes in calling for the covering over of "these taxes."

During the House debates, Representative Miller spoke in support of the cover over provision, using as an example tobacco taxes, which were specifically focused upon by the framers of the equalization tax. *See* 33 Cong. Rec. 1944 (1900). He described the taxes at issue as "excise taxes," on articles "consumed in the United States, having been imported from Puerto Rico," and then noted that "It is proposed in this bill *that that sum of money* shall go into the treasury of Puerto Rico." 53 Cong. Rec. 7475 (1916) (emphasis added). These are only two of numerous examples within the legislative history of framers' specific references to equalization taxes when discussing the scope of the new cover over provision. It is apparent that the cover over provision framers were not working in a vacuum; rather, they specifically considered a certain class of taxes

[12] The first portion of the description, "taxes that are collected under the internal-revenue laws of the United States on articles produced and used in Puerto Rico," refers to nonexistent taxes, since after section 14 of the Foraker Act was enacted, the United States did not tax Puerto Rican goods consumed in Puerto Rico. The second description, however, is an accurate description both of the Foraker equalization taxes and of their treatment.

when determining whether to enact the cover over provision. Never within the legislative history do we find a general description, such as "all inclusive," that is not preceded by a description of an equalization tax.

Throughout the legislative history accompanying the Jones Act, we also find less direct, but equally valuable, evidence that the taxes to be covered over were to be equalization taxes. In the House Report accompanying the Jones Act, the Committee used the amount that had been paid into the Treasury pursuant to the Foraker Act ($500,000) as a reasonable estimate of how much money Puerto Rico could expect to have covered over to its treasury in the future. H.R. Rep. No. 77, 64th Cong., 1st Sess. 2 (1917). And we note that the appellation "just" used by the House Committee in describing the cover over provision, *id.*, was almost a direct quotation from the House Report acompanying the Foraker Act and was used to describe the equalization tax provision. H.R. Rep. No. 249, 56th Cong., 1st Sess. 6 (1900).

The fourth and most decisive factor indicating the linkage of the two provisions was the amendment of the cover over provision on the floor of the Senate. When the cover over provision came to the Senate floor for a vote, it extended only to articles "manufactured in Puerto Rico and transported to the United States." The Senate amended it to apply to goods "manufactured in Porto Rico and transported to the United States, or consumed in the island."

Puerto Rico and the District Court have made much of this amendment, arguing that it devastates the United States' argument by extending the cover over provision to taxes that are not equalization taxes.[13] On the contrary, this amendment is powerful evidence in the United States's favor. As we noted above, the equalization tax applied *quid pro quo*, providing for the imposition not only of a tax

[13] *See* Commonwealth of Puerto Rico v. Blumenthal, No. 75-1035 at 11; Brief for Appellee at 11 n.13.

on goods manufactured in Puerto Rico and transported to the United States, but also of a complementary tax "on all articles of merchandise of United States manufacture coming into Porto Rico . . . of a tax equal in rate and amount to the internal-revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture."[14]

By amending the cover over provision to include articles "consumed in the island," Congress made the cover over provision perfectly coextensive with the Foraker equalization tax. The conclusion is inescapable that Congress did so intentionally. The phrase "consumed in the island" could only have applied to taxes laid pursuant to the equalization tax, since Congress had provided that all other internal revenue taxes would not apply "in Puerto Rico." Foraker Act, § 14, 31 Stat. 77 (1900). Puerto Rico's argument—that this clause applies to other United States taxes laid on locally manufactured and consumed goods—is simply incorrect, since no such taxes existed.

Thus, the phrase "consumed in the island" is meaningless unless it applies to the equalization tax laid on goods transported from the United States to Puerto Rico. Furthermore, for Congress to have amended the statute to cover exactly *all* of the equalization taxes indicates an intent to limit the cover over provision accordingly. We conclude that the amendment was intended to tie the cover over provision more closely to the Foraker equalization tax provision and to make the two provisions identical in scope.

Puerto Rico challenges our reading of the legislative history on three grounds. First, Puerto Rico points to the broad descriptions of the cover over provision that are contained within the legislative history, the most obvious being the description of the Senate amendment as having made the cover over provision "all inclusive, which is the

[14] *See* Section III-A-1 *supra*, for the complete text of the original Foraker equalization tax provision.

intent." S. Rep. No. 579, 64th Cong., 1st Sess. 2 (1916). As we have noted above, though, the Senate amendment merely extended the cover over provision to the only remaining portion of Foraker equalization taxes not yet included in the cover over provision; thus, the amendment certainly is not authority for the proposition that the cover over provision is broader than the equalization tax provision. Rather, given the nature of the amendment, the "all inclusive" language likely refers to inclusion of *all* equalization taxes.

More generally, Puerto Rico challenges any conclusion, on the basis of the legislative history, that the cover over provision is limited to equalization taxes. Although Congress may have been considering equalization taxes in framing the statute, Puerto Rico argues, Congress in no way evinced an intent to so limit the cover over provision's scope. This is especially true since, at the time the cover over provision was passed, the only taxes on Puerto Rican liquor and tobacco, Congress's greatest concerns, were equalization taxes; the retail sales tax and War Excise taxes had not yet been enacted.[15] We are urged not to interpret Congress's allusions to equalization taxes, then, as signs that Congress intended to limit the seemingly expansive language of the cover over statute.

This argument is true as far as it goes, in that legislative intent to include certain specific taxes does not necessarily exclude other taxes of a similar genre that may be enacted at some future time. *Jordan v. Roche*, 228 U.S. 436, 443 (1913) ["the internal revenue laws do not describe articles by name but by character"]. In this instance, however, we believe this fact cuts the other way, to explain why Congress did not limit the cover over provision to Foraker taxes in a more specific manner.

In this particular case we are convinced that Congress specifically intended to cover over only equalization taxes.

[15] *See* Brief for Appellant at 28; Commonwealth of Puerto Rico v. Blumenthal, No. 75-1035, at 10-11.

Congress amended the cover over provision to be exactly coextensive with the Foraker Act, which indicates a specific focus on the equalization taxes. Furthermore, those legislators who described the purview of the cover over provision uniformly described the covered taxes by *genre:* taxes on "those articles manufactured in Puerto Rico and transported to the United States."[16] The District Court cited these general descriptions for the proposition that the cover over tax is broader than the equalization tax, but we think the better interpretation is that Congress intended the cover over provision to cover *all* equalization taxes and *no* others. Third, the original drafted form of the cover over provision suggests that Congress assumed the cover over provision applied only to equalization taxes. Once it is assumed that the peculiar "proviso" form of the original drafting indicates this linkage, it follows inescapably that the proviso applies only to equalization taxes since the "proviso" construction would be illogical applied to any but equalization taxes. Thus, the cover over and equalization taxes seem closely linked, and Congress's intent to link them, regardless of later tax developments, is a sound conclusion.

Finally, we address Puerto Rico's general policy contention, which was adopted by the District Court in its opinion, that these two provisions cannot be linked because they were enacted at different times for different purposes. The argument, as phrased by Puerto Rico, is that the two provisions "derived from two entirely different statutes, enacted for totally different purposes seventeen years apart." Brief for Appellee at 11. The implicit assumption is that the latter statute—the cover over provision—contradicted the former at least in spirit.

Since we have just interpreted the legislative history of the Jones Act to indicate that the cover over provision applies only to equalization taxes, this argument would seem to be moot. If Congress in fact considered the two

[16] *See* 53 Cong. Rec. 7475 (1916) (remarks of Rep. Miller).

provisions related and acted upon that assumption, as we have held to be the case, neither Puerto Rico nor any court may interpose a different interpretation as a matter of hindsight.

But even if the legislative history were inconclusive, we could not accept the premise that the two statutes are contradictory in spirit and therefore irreconcilable. On the contrary, we believe that these enunciated "contradictory" goals, while accurate descriptions of the purposes behind the two provisions, are oversimplifications of Congress's purposes for passing the two Acts *in toto*. Considered in tandem, the two Acts appear intimately related, such that the latter statute—the cover over provision—is a logical outgrowth of the former.

The equalization taxation provision was in fact inspired by protectionist sentiments,while the cover over provision was primarily designed to bring revenue into the coffers of the Government of Puerto Rico. But it is quite inaccurate to label the equalization tax "protectionist" and the cover over provision "charitable" and abandon all attempts to reconcile the two. The equalization tax was made necessary only because Congress, elsewhere in the Foraker Act, indulged its charitable impulses toward Puerto Rico by exempting Puerto Rico from tax.[17] Thus, it is gross oversimplification to label the equalization tax merely a "protectionist" gesture. Rather, the tax represents an informed decision by Congress to balance its charitable impulses toward Puerto Rico against the need to protect mainland manufacturers from the results of Congress's altruism.

Similarly, the Jones Act cover over provision cannot be viewed in a vacuum. The thrust of the Jones Act was not simply charity toward Puerto Rico; the Act was intended primarily to integrate Puerto Rico into the United States federation to give its citizens the benefits of United States

[17] Foraker Act, § 14, 31 Stat. 77 (1900).

citizenship.[18] The Jones Act as a whole thus evidences a balancing process similar to that which occurred in the Foraker Act. Together the Foraker and Jones Acts can be seen as an ongoing attempt to enact a body of laws benefiting Puerto Rico and not injuring the United States mainland, and all the provisions of both Acts can be seen as means toward that end. The Jones Act debates contain numerous allusions to the Foraker Act,[19] and the tone of the debates indicates that Congress envisioned itself as improving upon reforms begun in the Foraker Act.[20] Notably, the two Acts were generally referred to as the "First and Second Organic Acts." Any assumption that their pro-

[18] A large portion of the Jones Act debates was consumed with discussion of whether Puerto Ricans should be given United States citizenship, a proposition which, given the terms of the bargain, many Puerto Ricans did not support. 53 Cong. Rec. 7470–7480 (1916). In the debates, Congress seemed primarily concerned with the long-term political stability of the island. *Id.* The cover over provision received little attention. *See* 53 Cong. Rec. 7475 (1916) (Rep. Miller's brief discussion of the cover over provision).

[19] Most notably, Representative Miller described the taxes collected pursuant to the Foraker Act, and their treatment prior to 1916, and then stated, "[T]hat is one of the changes made in the bill." 53 Cong. Rec. 7475 (1916). He then went on to describe the tobacco taxes upon which the framers of the Foraker tax concentrated, *see* 33 Cong. Rec. 1944 (1900) (remarks of Rep. Payne). Representative Miller concluded by remarking, "It is proposed in this bill that *that sum of money* shall go into the treasury of Porto Rico" (emphasis added).

[20] The Jones Act was intended primarily to supersede those portions of the Foraker Act creating a provisional government. 53 Cong. Rec. 7470–7473 (1916). Apart from criticizing the government created by the Foraker Act, the Congressmen and Puerto Rican witnesses discussing the Jones Act had high praise for the Foraker Act reforms (such as the public school system). *See* 53 Cong. Rec. 7470–7475 (1916) (particularly the remarks of Mr. Rivera).

visions are mutually exclusive is, therefore, unsupported by the Acts themselves.

But even if the Jones Act had represented a departure from earlier legislative policy, it is simply illogical to assume that the Congress enacting the Jones Act would not have made use of the equalization tax provision if that had seemed a logical and fair manner of aiding Puerto Rico. In enacting statutes to meet current needs, Congress does not ignore all statutes that went before, merely because those older statutes were enacted to meet different needs. In such a situation, the test is not the purposes of the statutes, but the statutory language—whether the two statutes can coexist and, together, effectuate some desired legislative policy. Nothing in these two statutes prevents their coexistence, and, more important, nothing prevents their linkage.

In fact, to assume that two such statutes could not coexist seems especially fallacious in this instance. The Foraker tax provision generates a discrete body of taxes, all collected at the same time, the covering over of which would be administratively simple, extremely helpful to Puerto Rico, and, in a sense, rather "just and fair" since the equalization taxes were imposed not for general revenue purposes benefiting all Americans, but for the purpose of protecting mainland manufacturers. To assume that Congress, in enacting a "charitable" provision, would not have made use of such an obvious tool simply because the tool was originally enacted for another purpose is simply unrealistic.

Of course, the fact that we can, with hindsight, see the covering over of Foraker taxes as a logical solution to Puerto Rico's dilemma does not mean that this was the route chosen by Congress; we cannot read our legislative preferences into the law. But it does cast doubt on Puerto Rico's assertion that Congress *could not* have intended to cover over only equalization taxes.

In sum, we read the legislative history surrounding the

passage of the cover over provision and the subsequent amendment of the statute to indicate that Congress intended to limit the scope of the cover over provision to Foraker taxes. While there are phrases within the legislative history susceptible to multiple interpretations, only the United States's interpretation of the cover over provision is consistent with (1) the overall purposes of both Organic Acts, (2) the original drafting of the statute, (3) the numerous references within the legislative history indicating that the cover over provision was tied to previous legislative enactments, and (4) the amendment of the statute to be absolutely coextensive with the equalization tax.

We also base our interpretation of the cover over provision, to a very great extent, on the inability of the District Court to marshal any legislative history supporting its exceedingly broad interpretation, or else to limit that broad interpretation in a principled fashion. The District Court and Puerto Rico completely ignore the fact that the broad language of the statute must be limited in some fashion, or else the "plain meaning" of the statute requires an absurd result. Our interpretation is, in our view, more consistent with Congress's ongoing attempt to benefit Puerto Rico without unduly harming mainland Americans.

B. *Administrative Constructions*

The District Court pretermitted any discussion of administrative constructions of the cover over provision by interpreting the cover over provision according to its "plain meaning." But, having held that the statute is by no means unambiguous, we undertake an examination of the administrative constructions of the cover over provision by the United States Treasury, the government agency charged with the statute's enforcement. The interpretation of a statute by that federal agency charged with the statute's enforcement is entitled to great weight in a court's construction of ambiguous statutory language,[21]

[21] Zenith Radio Corp. v. United States, 437 U.S. 443 (1978). *Accord*, Saxbe v. Bustos, 419 U.S. 65, 75 (1974); Udall v.

especially when, as in this case, "Congress has opted for legislative generality, leaving the agency with the task of definition on a case-by-case basis." *Chisholm v. Federal Communications Commission*, 538 F.2d 349, 358 (D.C. Cir.), *cert. denied*, 429 U.S. 90 (1976).

We find that a consistent administrative interpretation of the cover over provision supports our reading of the legislative history. The Treasury has repeatedly held that the cover over provision applies only to equalization taxes. These interpretations are entitled to great weight because they are both consistent and public. The Treasury has adhered to the same basic interpretation of the cover over provision for 50 years, and Puerto Rico has never challenged this interpretation nor Congress amended the statute to override this interpretation.

We rely on four major administrative constructions. The best publicized administrative interpretation of the cover over provision was undertaken by Acting Secretary of the Treasury O'Connell, in a letter transmitted to the Senate Finance Committee in 1947,[22] when the Senate was considering enacting an analogous cover over provision (S. 1014) for the Virgin Islands.[23] In his letter, the Acting

Tallman, 380 U.S. 1, 16 (1965). *See also* Gelman v. Federal Election Commission, (D.C. Cir. July 18, 1980), slip op. at 9; Kyle v. Interstate Commerce Commission, 609 F.2d 549 (D.C. Cir. 1979).

[22]The O'Connell letter was incorporated into the Committee Report, S. Rep. No. 476, 80th Cong., 1st Sess. 5-6 (1947), and placed on record during hearings before the House Ways and Means Committee in 1948 on a bill similar to S. 1014. *See* Hearings on H.B. 4979 before the House Committee on Ways and Means, 80th Cong., 2d Sess. 54 (1947).

[23]S. 1014 was not enacted by Congress, but seven years later Congress enacted a cover over provision that we are assuming to be identical in effect to that applying in Puerto Rico. *See* section II *supra*. Puerto Rico's argument that we should not consider the legislative history of a bill that was never enacted rep-

Secretary interpreted the Puerto Rico cover over provision as follows:

> It is the understanding of the Department that, insofar as S. 1014 relates to the internal revenue taxes collected upon articles produced in the Virgin Islands and transported to the United States, the tax proceeds segregated by the bill to the Virgin Islands are *. . . such taxes as are due and payable at the time the Virgin Islands article is withdrawn from customs for the consumption or sale in the United States.* It is the further understanding of the Department *that the bill does not cover taxes collected with respect to Virgin Islands articles after they have entered within the United States; that is that the bill does not cover such taxes as Federal retail sales taxes collected with respect to Virgin Islands articles sold at retail in the United States*, nor the tax on manufactured sugar which may be paid by the manufacturer under section 3490 of the Internal Revenue Code with respect to Virgin Islands raw sugar refined in the United States *. . . The views expressed above as to the internal revenue taxes covered by S. 1014 are the construction which the Department has given to section 3360(a) [now the Puerto Rico cover over provision codified at 26 U.S.C. § 7652(a)(3) (1976)] of the Code in the case of internal revenue taxes segregated to Puerto Rico.*

(App. 25) (emphasis added).

In so holding, O'Connell held that the cover over provision applies only to those taxes we have identified as equalization taxes: those taxes imposed as conditions of entry into the United States, not those domestic taxes im-

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resents a correct statement of the law, Interstate Natural Gas Co. v. F.P.C., 156 F.2d 949, 952 (5th Cir. 1946), *aff'd.*, 331 U.S. 682 (1947), but it is a principle inapplicable to the case at hand. We are examining the O'Connell letter not as legislative history of S. 1014, but as a Treasury construction of the Puerto Rico cover over provision.

posed on all goods alike after the goods enter the mainland market.[24]

The Treasury again undertook an exhaustive discussion of the cover over provision in a memorandum from Chief Counsel Oliphant of the IRS to Deputy Commissioner Valaer, dated July 9, 1951. (Doc. C-62) (App. 366). In this memorandum Oliphant determined that the cover over provision applies only to Foraker equalization taxes. His conclusion was based, first, on the equalization purpose of the Foraker tax provision. Given this, he said, clearly the Foraker provision was not intended to extend to any taxes "the liability for which would not attach until after the Puerto Rican goods have entered into commerce within the United States." (App. 369). No equalization is necessary in such a case.

Oliphant went on to conclude that only equalization taxes need be covered over to Puerto Rico. He noted that the same factor making equalization unnecessary—taxation after the Puerto Rican and mainland goods enter the United States market on equal terms—also makes cover over of such tax revenues impossible, absent tracing (App. 370). Furthermore, he noted briefly that cover over of any taxes from which Puerto Rico was never exempt in the first place seems fundamentally illogical. *Id.* Oliphant's ultimate conclusion—that only liquor and tobacco require equalization taxes—has since been repudiated by the IRS, in favor of a more general view comporting with our interpretation herein,[25] but this in no

[24] *See* Section III-A-1 *supra*.

[25] In Revenue Ruling 58-554, 1958-2 C.B. 909, the IRS held that application of the equalization tax provision depends not on the nature of the article but on the nature of the *domestic tax* laid on that article. This comports with our interpretation of the Foraker equalization tax discussed at III-A-1 *supra*. Since the IRS released Revenue Ruling 58-554, the Treasury has examined the applicability of the Foraker tax to Puerto Rican margarine (Doc. C-57) (App. 316) and Puerto Rican ballpoint pens

way undercuts the validity of his general argument, which is closely tied both to the legislative purpose of the two provisions and to simple logic.

A shorter IRS file memorandum reiterated this interpretation of the cover over provision to apply only to those revenues from taxes imposed upon manufacture or before withdrawal for sale. Doc. C-6, May 1, 1947 (App. 360-365). The author of this file memorandum clearly linked the cover over and the equalization tax provisions. He noted that the purpose of the Foraker tax is to equalize competition, and this is necessary only when the article escapes a tax laid before that article reaches the mainland. As he stated,

> After articles have entered the country, been merged with the commerce of the United States, if they have become subject to Federal retail or manufactures tax, or processing tax, tax proceeds have never been segregated to the Philippines or Puerto Rico unless specifically directed by statute.

Doc. C-7, May 1, 1947 (App. 365). He then held that taxes not imposed under the Foraker tax provision need not be covered over to the Treasury of Puerto Rico (App. 362).

The most detailed interpretation of the Foraker equalization tax provision appears in Revenue Ruling 58-554, 1958-2 C.B. 909, in which, as noted above,[26] the IRS overruled the narrow application of the equalization tax only to liquor and tobacco. In this ruling, the IRS also held that the equalization tax is triggered only by a domestic tax on the manufacture of goods, not by a tax on the sale of goods. This revenue ruling is of crucial importance because the IRS had occasion to consider directly the application of the equalization tax provision to the gasoline tax at issue here.

(Doc. H-15) (App. 372). *See* our discussion of Revenue Ruling 58-554 at text accompanying note 26 *infra*, for an examination of other aspects of this ruling.

[26] *See* note 25 and accompanying text *supra*.

This revenue ruling concluded that certain taxes imposed by Chapter 32 of the Code (including the gasoline tax) need not be covered over because

> the general wording of the statute, references thereto by Congress, and its purpose as expressed by the Supreme Court of the United States indicate that any articles may be so subjected, *provided the tax relating thereto is laid on the act of manufacturing rather than the act of sale.*

(emphasis added). The IRS explained:

> Administrative considerations and departmental policy further indicate that the only taxes imposed by section 7652 of the Code are those which can be imposed *at the time of entry of the goods into the United States or at the time they are withdrawn from places of government supervision. . . . a tax on the act of manufacturing, as distinguished from a tax on the act of sale, would be within the purview of section 7652 of the Code.* The manufacturers excise tax imposed by Chapter 32 of the Code and the retailers excise tax imposed by Chapter 31 of the Code are examples of taxes *excluded from* the meaning of the phrase "the internal revenue tax" in section 7652(a)(1) of the Code. *Those taxes are imposed on the sale and not on the act of manufacturing.*

(emphasis added).

The gravamen of the IRS ruling is on all fours with our view: the IRS reasoned that, since Chapter 32 taxes (including the gasoline tax) are imposed at the point of sale, they do not create the unequal tax burden requiring application of the equalization tax.

In sum, the Treasury has consistently interpreted the cover over and equalization tax provisions in a manner that comports with our view of the legislative history. The Treasury has held that only taxes payable at manufacture, as a condition of entry into the competitive market, trigger equalization taxes, and that only equalization taxes need be covered over. More important, the Treasury

reached this conclusion in a consideration of the specific gasoline tax at issue in this case. Rev. Ruling 58-554, 1958-2 C.B. 909.

Considering that these constructions are longstanding, consistent, and legally sound, we are not disposed to override them. We conclude that the cover over provision applies exclusively to those taxes laid pursuant to the equalization tax provision, 26 U.S.C. § 7652(a)(1) (1976).

IV

Our only remaining inquiry is whether the gasoline tax revenues sought by Puerto Rico and the Virgin Islands were collected pursuant to an equalization tax. If so, Congress has directed that these funds should be covered over to the island treasuries. We find ourselves in agreement with the IRS regarding this gasoline tax, however, and hold that it does not require application of the equalization tax. Gasoline is taxed at the point of sale, not manufacture; thus, Puerto Rican and mainland manufacturers meet in the market as equals. An examination of the gasoline statute, as compared to the liquor and tobacco statutes, clearly reveals this difference and compels this result.

The gasoline tax statute provides:

> There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon.

26 U.S.C. § 4081(a) (1976). The alcohol and tobacco tax statutes, which the United States has long held to require application of the equalization tax, provide in relevant part:

> There is hereby imposed on all distilled spirits produced in or imported into the United States a tax at the rate of $10.50 on each proof gallon and a proportionate tax at the like rate on all fractional parts of a proof gallon . . .

> (c) *Cross reference.—For provisions relating to the tax on shipments to the United States of taxable articles from Puerto Rico and the Virgin Islands, see section 7652.*
>
> * * *
>
> On cigars, manufactured in or imported into the United States, there shall be imposed the following taxes . . . .

26 U.S.C. § 5001 (1976) (liquor tax); 26 U.S.C. § 5701 (1976) (tobacco tax). The crucial difference is immediately apparent: the gasoline tax is imposed upon gasoline "sold by the producer or importer thereof," while both the liquor and tobacco taxes are imposed upon the "manufacture" or "production" of the product.

We read the legislative history of the Foraker Act to require the imposition of an equalization tax only when a domestically laid tax has failed to reach a Puerto Rican article at the time the article enters into competition with domestic goods in the mainland market.[27] Here the Puerto Rican gasoline comes into direct competition with domestically manufactured gasoline, but, at the time they come into contact, no gasoline has yet been taxed and the Puerto Rican manufacturer has no competitive edge. The manufacturers meet as equals. Thus, one of the conditions we have postulated herein has not been fulfilled: domestic gasoline has not been subjected to a tax from which Puerto Rican gasoline remains exempt. The "protectionist" purpose of the equalization tax is not implicated.

This situation is in contrast to that which occurs when a tax is laid on the manufacture of cigars. The tax applies by its terms to cigars "manufactured in the United States" but, since Puerto Rico is not considered part of the United States for purposes of the internal revenue tax, the Puerto Rican manufacturer escapes the manufacturer's excise

[27] *See* Section III-A-1 *supra*.

tax. Under these circumstances, the equalization tax provision requires that a tax equal to the domestic tax on manufacture be collected before the good enters the competitive market and undersells the domestically manufactured product. This is exactly the process by which alcohol and tobacco shipped from Puerto Rico are taxed, either in Puerto Rico or upon entry into the United States and removal from bond. *See* 27 C.F.R. § 250.1–250.119 (1979).

Other characteristics of the gasoline tax make this difference even more pronounced. Section 4081, read in conjunction with its definitional statutes (sections 4082 and 4083), clearly indicates that the gasoline tax is a tax on *sale* applied to goods while they are in the United States, not in tax-exempt Puerto Rico. In 26 U.S.C. § 4082, Congress defines "producer" to include any "refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer." Congress goes on to provide that "any person to whom gasoline is sold tax-free under this subpart shall be considered the producer of such gasoline." *Id.* In section 4083, Congress provided that the "tax imposed by section 4081 shall not apply in the case of sales of gasoline to a producer of gasoline." 26 U.S.C. § 4083 (1976).

In other words, gasoline can change hands within the United States indefinitely, without the taxable event occurring; the tax is not levied until some producer sells to a retailer. The taxable event could be long delayed, or it could occur on the first sale after the gasoline enters the country; the point is that Congress has clearly pinpointed *sale* as the taxable event.

As we noted above,[28] the IRS has considered this precise question and ratified our interpretation of the gasoline tax. In an explicit consideration of the gasoline tax, as well

[28] *See* text accompanying note 26 *supra*.

as of the other taxes in Chapter 32 of the 1954 Code, the IRS held that the Chapter 32 taxes are levied on sale, not manufacture, and therefore need not be covered over to Puerto Rico. Rev. Ruling 58-554, 1958-2 C.B. 909. But even if Revenue Ruling 58-554 did not specifically address this question, it adopts a view of the equalization tax—as being dependent on the domestic tax at issue—that would lead us inexorably to the same conclusion. The gasoline tax simply does not require the laying of an equalization tax. Therefore, the revenues it generates certainly are not equalization tax revenues suitable for cover over.

Puerto Rico argued, and the District Court held, that the difference in language between the gasoline tax statute and the liquor and tobacco taxes (domestic taxes long held to require application of the equalization tax) is irrelevant because the taxes are all functionally identical, but we find these arguments uniformly unpersuasive. First, the argument that the statutes are identical in language, or that their "minor" semantic differences should not be deemed significant because the taxes are otherwise identical,[29] is plainly without merit. The crucial inquiry is whether the gasoline tax is laid on the act of sale or manufacture, and the gasoline tax statute states plainly that a four cent tax will be laid on gasoline "sold," while the liquor and tobacco taxes are laid on articles "manufactured." This difference may be irrelevant in other contexts, but it is certainly determinative in this instance.[30]

Any attempt to portray the gasoline statute and the tobacco and liquor statutes as functionally identical is also doomed to fail. Regardless of where the incidence of the

[29] Brief for Appellee at 20.

[30] At any rate, the Supreme Court has mooted this argument, for purposes of the gasoline tax, by holding that the gasoline tax is levied at the point of sale to a retailer. Gurley v. Rhoden, 421 U.S. 200 (1975).

tax falls,[31] how the tax is measured,[32] or whether the gasoline tax resembles manufacturer's excise taxes in certain other trivial respects,[33] it is indisputably true that the

[31] In Gurley v. Rhoden, 421 U.S. 200 (1975), the Supreme Court held that the incidence of the gasoline tax falls on the producer who makes the taxable sale to the retailer, and not on the consumer. In fact, the Treasury has promulgated regulations to this effect. 26 C.F.R. § 48.480 4081-1(c) (1979). These regulations contain within them even more evidence that the gasoline tax is levied at the point of sale: "The tax imposed by section 4081 is payable by the producer or importer making the sale of the gasoline." *Id.* (emphasis added).

We feel that the question of who pays the tax is legally irrelevant. Regardless of who pays this tax (and, we emphasize, the tax may be paid by the manufacturer or any in a long line of middlemen), the tax liability arises at the point of *sale*. The Puerto Rican and mainland products meet in the market on equal terms, and no equalization is necessary.

[32] Puerto Rico argues that the gasoline tax is really a manufacturer's excise tax because it is computed without reference to market prices at the time the gasoline is sold; rather, a flat four cents a gallon tax is laid on each gallon sold or used. Brief for Appellee at 23. This merely proves that the gasoline tax is not a retail sales tax, which has never been argued herein. It is irrelevant to the crucial question: whether gasoline coming into the United States from Puerto Rico has already escaped a domestically laid tax on manufacture.

[33] Two other alleged similarities deserve mention. Puerto Rico argues that the gasoline tax is not a tax on sale because is is "imposed on the entirety of gasoline produced whether sold or not." Brief for Appellee at 22. Puerto Rico alludes to the fact that the IRS, by regulation, imposes the tax upon the sale or use of the gasoline. 26 C.F.R. § 48.4082-1(c) (1979).

This regulation, however, in no way undercuts our argument. In this regulation the IRS specifically analogizes certain types of uses to sales, and then proceeds to tax those uses as if they were sales. This only underscores our reading of the gasoline statute as a tax triggered by sale, not by manufacture.

The final argument worth considering is Puerto Rico's conten-

gasoline tax is laid on sale, while manufacturer's excise taxes such as liquor and tobacco taxes are laid on manufacture. Because the gasoline tax is laid on sale, it does not give Puerto Rican manufacturers any advantage when they bring their gasoline into the mainland market. The competitive statures of the manufacturers are equal, and no equalization tax is required.

By adopting Puerto Rico's arguments to the contrary, the District Court failed to recognize that *time of taxation* is the crucial inquiry, and that the gasoline statute differs from the others in this respect. As a result, the District Court erred in concluding that the gasoline tax revenues, past and future, must be covered over to the island treasuries. We reverse, and hold that the United States correctly withheld these tax revenues.

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tion that the tax liabilities for these three statutes actually occur at the same time. This is simply untrue. Liquor and tobacco are taxed in Puerto Rico before their shipment to the United States, or taxed upon release from warehouse or bond. 27 C.F.R. § 250.1-250.119 (1979). The regulations controlling this process are extremely complex. They include provisions for deferred payment of tax, and it is probably this provision upon which Puerto Rico bases its claim. But the difference is illusory. Regardless of when the manufacturer of liquor and tobacco actually pays the tax, the tax liability occurs when the articles leave the manufacturer's control and enter into the mainland market. Because of the tax liability, the competitive positions of the mainland and Puerto Rican manufacturers are equalized; without it, the mainland manufacturer would carry an unfair tax burden.

The gasoline tax, on the other hand, is not levied until the time of taxable sale. This may occur immediately after the gasoline enters the United States, or it may occur much later, after the gasoline has passed through the hands of several middlemen producers. The point is that the gasoline has entered the mainland market on equal terms with mainland-manufactured gasoline. For all of Puerto Rico's arguments to the contrary, the difference could hardly be clearer.

V

To sum up, we hold that the cover over provision at issue, 26 U.S.C. § 7652(a)(3) (1976), requires that the Treasury cover over to Puerto Rico only those revenues collected pursuant to the Foraker equalization tax, 26 U.S.C. § 7652(a)(1) (1976). The gasoline tax revenues at issue were not collected pursuant to the equalization tax. Gasoline is not taxed before it enters the market; thus, Puerto Rican manufacturers obtain no competitive advantage over mainland manufacturers on account of the gasoline tax. Rather, the gasoline tax is collected at a later point, when the producer of the gasoline makes a taxable sale to a retailer. Puerto Rican and mainland gasoline, by this time mixed in the market, is taxed equally. The gasoline tax, therefore, never creates an anticompetitive situation such as that envisioned by Congress when it enacted the Foraker equalization tax and cover over provisions. The gasoline tax revenues are not equalization tax revenues, and need not be covered over to the island treasuries.

We are aware that this interpretation is complex, whereas the holding of the District Court had the advantage of simplicity, in theory if not in practice. But the legislative history of the Jones and Foraker Acts reveals Congress's intention that, as new taxes and new situations developed, the equalization tax would be imposed when necessary to equalize the competitive statuses of manufacturers. This is apparent from the open-ended language of the equalization tax provision: in it Congress did not specify which statutes by their terms would require the imposition of a residual equalization tax upon Puerto Rican goods. The Treasury, and occasionally the courts, must be prepared to examine each domestic tax statute individually, with an eye to whether the mandate of equal competition requires application of the Foraker equalization tax. As the Treasury has noted before, in Revenue Ruling 58-554, application of an equalization tax simply is not warranted in the case of gasoline.

VI

Because we reverse the District Court holding on the merits, and hold that neither Puerto Rico nor the Virgin Islands is entitled to revenues from taxes imposed on its gasoline, we pretermit any discussion of the laches, statute of limitations, or sovereign immunity issues addressed by the District Court and by the parties in their briefs. Moreover, because we find that the cover over provision applies only to equalization taxes, and that the taxes on gasoline of Puerto Rican origin are not equalization taxes, we need not consider the Government's contention that the Highway Trust Fund, created pursuant to the Highway Revenue Act of 1956, § 209A, 70 Stat. 374 (the Highway Fund is codified at 23 U.S.C. § 120 note (1976)), implicitly repeals the cover over provision's application to Puerto Rican gasoline. Under our interpretation, these gasoline tax revenues are not diverted from the Highway Trust Fund.

We hereby reverse the District Court grant of partial summary judgment in favor of Puerto Rico in No. 79-1020 and summary judgment in favor of the Virgin Islands in No. 79-1021, and remand with directions to enter judgment in favor of the United States.[34]

It is so ordered.

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[34] Shortly after the District Court decisions in the Puerto Rico and Virgin Islands cases, the United States moved in this court for a stay pending appeal. A motions panel of this court denied the motion, instead ordering the United States Treasury to deposit into an interest-bearing escrow account the revenues at issue in these suits. This account was to be maintained, and revenues and interest accumulated, from the time of the District Court orders until one of two events occurred: 1) the institution of a formal cover over policy following an affirmance on the merits, or 2) a final appellate decision reversing the District Court.

On July 23, 1979, the United States moved in this court to modify the orders to eliminate the requirements for payment of interest, and it also requested that this court consider the motion concurrently with a decision on the merits. Because we reverse the District Court judgment and hold that none of these revenues need be covered over, the first stay orders will expire by their own terms when our decision becomes final, and the subsequent motion to modify will be mooted.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0916

VIRGIN ISLANDS, *Plaintiff*,

v.

W. MICHAEL BLUMENTHAL, Secretary of the Treasury,
Defendant.

ORDER

[Filed October 11, 1978]

Upon consideration of plaintiff's motion for partial summary judgment and defendant's cross-motion for summary judgment, the points and authorities filed in support thereof, the arguments of counsel in open Court, the entire record herein, and for the reasons set forth in the Court's Memorandum issued this same day, it is by the Court this 11th day of October, 1978,

ORDERED that plaintiff's motion for partial summary judgment be, and hereby is, granted in part and denied in part; and it is further

ORDERED that defendant's cross-motion for summary judgment be, and hereby is, denied; and it is further

ORDERED and DECLARED that section 28(a) of the 1954 Revised Organic Act of the Virgin Islands requires the defendant Secretary of the Treasury to cover into the Treasury of the Virgin Islands all customs duties (but not including oil import license fees) collected on goods transported into the United States from the Virgin Islands; and it is further

ORDERED and DECLARED that section 28(b) of the 1954 Revised Organic Act of the Virgin Islands requires the

defendant Secretary of the Treasury to cover into the Treasury of the Virgin Islands all revenues collected from the excise tax levied on gasoline refined in the Virgin Islands and transported into the United States.

/s/ OLIVER GASCH
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0916

VIRGIN ISLANDS, *Plaintiff*,

v.

W. MICHAEL BLUMENTHAL, Secretary of the Treasury, *Defendant*.

MEMORANDUM

This case is presently before the Court on plaintiff's motion for partial summary judgment and defendant's cross-motion for summary judgment. Plaintiff, the Virgin Islands, claims that certain statutory provisions require the defendant Secretary of the Treasury to cover into the Treasury of the Virgin Islands all internal revenue taxes and customs duties (including oil import fees) levied on products coming into the United States from the Virgin Islands. Plaintiff specifically argues that the plain language of section 28 of the 1954 Revised Organic Act of the Virgin Islands [1] requires the covering over of these taxes and customs duties. Defendant responds that the legislative history of section 28 and the statutory provisions antedating it, as well as the long-standing administrative construction of these provisions, show that section 28 does not have the broad scope that plaintiff claims it has.

Plaintiff's claim can be divided into two distinct parts: (1) the claim that revenue from the excise levied on gasoline refined in the Virgin Islands and transported to the United States must be covered into the Virgin Islands' Treasury; and (2) the claim that customs duties (including oil import fees) levied on goods coming into the United States from the Virgin Islands must be covered into the

[1] 68 Stat. 497 (1954).

Virgin Islands' Treasury. Plaintiff's claim regarding the excise tax levied on Virgin Island gasoline is virtually identical to the claim made by the Commonwealth of Puerto Rico in the case before this Court of *Commonwealth of Puerto Rico v. Bluementhal,* C.A. 75-1035 (D.D.C.). In ruling on cross-motions for summary judgment in the *Puerto Rico* case, the Court concluded that the cover over provision applicable to Puerto Rico requires that revenues from the excise tax on Puerto Rican gasoline be covered into the Puerto Rican Treasury. The Court considered, and rejected, the same arguments that defendant presents herein against the Virgin Islands' claim that the excise tax levied on Virgin Islands gasoline must be covered into the Virgin Islands' Treasury. Accordingly, without further discussion, and for the reasons set forth in the Court's Memorandum in the *Puerto Rico* case, the Court holds that section 28(b) of the 1954 Revised Organic Act of the Virgin Islands requires that revenues from the federal excise tax on gasoline refined in the Virgin Islands and transported to the United States be covered into the Treasury of the Virgin Islands.[2]

Having resolved the first part of plaintiff's claim, the Court will hereafter focus on that part of plaintiff's claim regarding the covering over of customs duties imposed on goods coming into the United States from the Virgin Islands.

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[2] Section 28(b) of the 1954 Revised Organic Act, as presently codified at 26 U.S.C. § 7652(b)(3) (1976), provides that the Secretary of the Treasury annually "shall determine the amount of all taxes imposed by, and collected during the quarter under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States" and shall transfer and pay over "to the Government of the Virgin Islands from the amounts so determined a sum equal to the total amount of the revenue collected by the Government of the Virgin Islands during the quarter, as certified by the Government Comptroller of the Virgin Islands."

BACKGROUND

Plaintiff's claim concerning customs duties on goods transported from the Virgin Islands to the United States is based specifically on the language of section 28(a) of the 1954 Revised Organic Act. Section 28(a) provides:

> The proceeds of customs duties, the proceeds of the United States income tax, the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands, less the cost of collecting all of said duties, taxes, and fees, shall be covered into the Treasury of the Virgin Islands . . . .

See 48 U.S.C. § 1642 (1970). Plaintiff argues that the reference in section 28(a) to "customs duties" is unqualified and plainly includes customs duties imposed on Virgin Islands goods coming into the United States. Defendant contends, however, that the term "customs duties" was only intended to encompass those duties imposed on goods coming into the Virgin Islands. To fully understand the significance and intent of section 28(a), it is necessary at the outset to briefly review earlier fiscal provisions pertaining to the Virgin Islands.

The Virgin Islands were acquired from Denmark in 1916, and Congress passed the original fiscal legislation for the Islands in 1917. The Act of 1917, 39 Stat. 1132, had three significant provisions. Section 3 provided generally that goods coming into the United States from the Virgin Islands would be subject to "the rates of duty and internal revenue taxes which are required to be levied, collected, and paid upon like articles imported from foreign countries . . . ." This provision excepted from its terms, however, articles primarily indigenous to the Virgin Islands. These articles could be brought into the United States duty free. Thus, section 3 of the 1917 Act was intended to impose a

duty on foreign goods imported into the United States through the Virgin Islands. Such a duty was necessary because the tariff laws of the United States were not otherwise applicable to goods brought into the United States from the Virgin Islands and because goods imported from foreign countries into the Virgin Islands entered the Islands virtually duty free. Without the duty imposed by section 3, foreign producers could import goods into the United States through the Islands essentially duty free and thereby avoid United States' tariffs.

Section 4 of the 1917 Act continued in effect "all laws now imposing taxes in the said West Indian Islands, including the custom laws and regulations . . . ." This provision established the basic network of statutes through which specific taxes would be imposed and collected in the Islands. For example, it had the effect of continuing the small six percent import duty imposed on goods brought into the Islands.

Section 5 of the 1917 Act was the predecessor of section 28(a) of the 1954 Revised Organic Act. It provided "[t]hat the duties and taxes collected in pursuance of this Act shall not be covered into the general fund of the Treasury of the United States, but shall be used and expended for the government and benefit of said islands . . . ." This provision clearly provided for the rebate of duties and taxes continued in effect by section 4 of the Act. Yet, even though it appears equally clear that the provision encompassed duties imposed by section 3 of the Act on goods imported into the United States through the Virgin Islands from foreign countries, a question arose about the applicability of the rebate provision to such duties. On April 3, 1917, forty days after the enactment of the 1917 Act, the Comptroller of the Treasury issued his opinion that duties collected in the United States on foreign goods imported through the Virgin Islands were not within the scope of

section 5.[3] The Comptroller reasoned that these duties were not imposed "in pursuance of th[e] Act," but were imposed by already existing federal tariff law. The comptroller reasoned further that the legislative history of the 1917 Act indicated that the principal source of revenue for the Islands would be a sugar export tax established by section 4 of the Act. The Comptroller did not refer, however, to any specific portion of the Act's legislative history supporting his conclusion. The Comptroller General's interpretation of section 5 of the 1917 Act, and his underlying rationale, were reaffirmed in an opinion issued by the Attorney General in 1926.[4]

Plaintiff emphasizes that the Department of the Interior objected to the Treasury Department's narrow interpretation of section 5. In a letter dated February 24, 1941 to the Attorney General, the Secretary of the Interior expressed his disagreement with the view of the Treasury Department.[5] In essence, the Interior Department disputed the view that the duties imposed in the United States on goods imported through the Virgin Islands from foreign countries were not imposed "pursuant to" the 1917 Act. Nevertheless, in a letter to the Secretary of the Interior dated March 3, 1941,[6] the Attorney General reaffirmed the interpretation of section 5 previously set forth by the Comptroller of the Treasury and the Attorney General.

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[3] *See* 23 Comp. Dec. 574 (April 14, 1917); Exhibit 3 of Plaintiff's Exhibits in Support of Plaintiff's Motion for Partial Summary Judgment.

[4] 25 Op. A.G. 63 (June 9, 1926); Exhibit 4 of Plaintiff's Exhibits in Support of Plaintiff's Motion for Partial Summary Judgment.

[5] *See* Exhibits 6 and 7 of Plaintiff's Exhibits in Support of Plaintiff's Motion for Partial Summary Judgment.

[6] *See* Exhibit 8 of Plaintiff's Exhibits in Support of Plaintiff's Motion for Partial Summary Judgment.

In 1936, Congress passed the first Organic Act of the Virgin Islands. 49 Stat. 1807. This Act was primarily concerned with establishing a civil government for the Virgin Islands. Section 18 of the Act generally continued in force and effect all law of the United States applicable to the Virgin Islands and all local laws not inconsistent with the 1936 Act. Section 35 of the Act, however, which was the forerunner of section 28(a) in the 1954 Revised Organic Act, specifically provided that "the proceeds of customs duties . . . and the proceeds of the United States income tax, and the proceeds of any taxes levied by Congress on the inhabitants of the Virgin Islands, and all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands shall be covered into thet Treasury of the Virgin Islands . . . ." It is significant that section 35 of the 1936 Act and section 28(a) of the 1954 Act, which contain virtually identical language and successively replaced section 5 of the 1917 Act, do not include the clause "collected in pursuance of this Act." It was this clause that the Comptroller of the Treasury and the Attorney General relied on in construing narrowly the cover over provision in section 5 of the 1917 Act. Nevertheless, the Secretary of the Treasury continues to construe section 28(a) in the same restrictive manner, relying primarily on the Comptroller's interpretation of section 5 of the 1917 Act.

MERITS

A. Plaintiff's Claim that Section 28(a) Requires the Covering Over of "Customs Duties" Levied on Goods Coming into the United States From the Virgin Islands.

The Court concludes that section 28(a) of the Revised Organic Act of 1954 requires that customs duties imposed on goods coming into the United States from the Virgin Islands be covered into the Treasury of the Virgin Islands. This conclusion is supported by the plain meaning of section 28, when read in its entirety, and the complete absence

of any indication in the legislative histories of the 1954 Revised Organic Act, the 1936 Organic Act, or the 1917 Act, that the provision for the covering over of customs duties was intended to be limited to locally imposed customs duties on goods brought into the Virgin Islands.

Section 28(a) of the 1954 Act provides for the covering over of the proceeds of four categories of taxes: customs duties; the United States income tax; taxes levied by Congress on the inhabitants of the Virgin Islands; and quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands. Defendant correctly notes that the term "customs duties" cannot be viewed as unambiguous because it does not differentiate between customs duties imposed under local law on goods brought into the Virgin Islands and customs duties imposed under federal law on goods brought into the United States from the Virgin Islands. Defendant offers no basis for presuming, however, that the term "customs duties" on its face must be understood to include only those customs duties imposed locally on goods brought into the Virgin Islands. More importantly, it becomes clear, when the reference to "customs duties" in section 28(a) is understood within the context of the other references in section 28(a) and the other subdivisions of section 28, that the term "customs duties" must be interpreted to include those duties imposed on goods transported to the United States from the Virgin Islands.

First of all, it is significant to note that the three categories of taxes other than customs duties covered over pursuant to section 28(a) are United States levies affecting in some way the Virgin Islands. They are not taxes imposed by the local government of the Virgin Islands, such as the local duties imposed on goods brought into the Virgin Islands. Moreover, the covering over of only one of the categories included in section 28(a)—quarantine, passport, immigration, and naturalization fees—is specifi-

cally limited to collections thereof in the Virgin Islands. It reasonably follows that had Congress wanted to limit the covering over of customs duties in a similar fashion, it would have referred specifically to "customs duties collected in the Virgin Islands" rather than "customs duties" in general. Furthermore, although section 28(a) contains a specific proviso excepting a certain tax from its scope, the terms of section 28(a) do not indicate in any way that Congress intended to except from the provision customs duties on goods coming into the United States from the Virgin Islands.

Secondly, similar to the focus of section 28(a) on taxes levied under United States law, the other subdivisions of section 28 are concerned with provisions of the United States Code as they apply to the Virgin Islands. Section 28(b) provides for the covering over to the Treasury of the Virgin Islands of all taxes imposed under the internal revenue laws on products of the Virgin Islands transported to the United States. Section 28(c) provides for the application of the Trademark Act of 1946 to importations of merchandise from the Virgin Islands into the United States. Lastly, section 28(d) provides for the imposition of duties and an equalization tax on articles coming into the United States from the Virgin Islands. Thus, section 28(d) provides for the imposition of the very customs duties that defendant argues Congress did not intend to include within its general reference to "custom duties" in section 28(a).

The focus throughout section 28 on internal revenue laws and other laws generally applicable to the Virgin Islands strongly suggests the conclusion that the reference in section 28(a) to "customs duties" was not intended to be limited to those duties imposed under local law on goods imported into the Virgin Islands. This conclusion, based on the ordinary meaning of the term "customs duties" within the context of section 28, is confirmed by the lack of any legislative history to the 1954 Revised Organic Act indi-

cating that "custom duties" only extends to those duties imposed on imports into the Virgin Islands.

Defendant presents several arguments against the foregoing conclusion. Most significantly, defendant argues that section 28(a) is "in substance" a reenactment of the cover over provision in section 5 of the 1917 Act and that the long-standing administrative construction of section 5 was that duties on goods coming into the United States from the Virgin Islands were not to be covered into the Virgin Islands Treasury. This argument has several flaws. First of all, section 28 cannot properly be viewed as a mere reenactment of section 5 of the 1917 Act; the 1954 Revised Organic Act completely superseded any inconsistent provisions of the 1936 Organic Act and the 1917 Act. *See Virgo Corp. v. Paiewonsky*, 384 F.2d 569 (3d Cir. 1967). Thus, section 28(a) must be read on its own terms and cannot be presumed to have the same meaning as section 5 of the 1917 Act. In fact, the terms of section 28(a) are considerably different from those of section 5 of the 1917 Act, and section 28(a) does not include the "in pursuance of this Act" clause relied on so heavily by the Comptroller of the Treasury in support of his narrow construction of section 5. Accordingly, whatever force the interpretation of the Comptroller and the Attorney General may originally have had, (and it appears to the Court that their interpretation disregards the clear meaning of section 5), that force has been essentially dissipated by the marked difference between the terms of section 28(a) of the 1954 Act and section 5 of the 1917 Act.

The defendant additionally argues that the covering over of customs duties on goods coming into the United States from the Virgin Islands would be contrary to equity. Defendant suggests that it would be illogical to rebate to the Virgin Islands duties imposed on goods foreign to the Virgin Islands. Plaintiff argues with considerable persuasiveness, however, that it is more illogical that Congress

intended to cover over only the meager customs duties levied on goods imported into the Virgin Islands. As discussed earlier, these goods traditionally have entered the Virgin Islands almost duty free, and the amount of revenues from duties imposed on such goods would be negligible. It would be surprising if Congress intended that only the insubstantial amount of duties collected on imports into the Virgin Islands be covered into the Virgin Islands Treasury.

In sum, the Court does not believe that defendant's reliance on an outdated administrative construction of questionable validity is sufficient to overcome the plain meaning of section 28(a) that customs duties on goods transported from the Virgin Islands to the United States be covered into the Treasury of the Virgin Islands.

B. Plaintiff's Claim that Oil Import License Fees on Crude Oil and Petroleum Products Transported from the Virgin Islands to the United States Are "Customs Duties."

The Court has concluded that section 28(a) of the 1954 Revised Organic Act requires the covering into the Virgin Islands Treasury of customs duties collected on goods transported into the United States from the Virgin Islands. Plaintiff asserts additionally, however, that oil import license fees imposed on petroleum products transported into the United States from the Virgin Islands are "customs duties" and therefore must be covered into the Virgin Islands Treasury. Plaintiff contends that the license fees levied on petroleum products are the legal equivalent of customs duties. Defendant responds that the license fees serve a different purpose than, and are substantially distinguishable from, customs duties. The Court agrees with defendant that the license fees levied on petroleum products transported into the United States from the Virgin Islands are not "customs duties" within the meaning of section 28(a).

The oil import license fees at issue here were initially imposed in 1973 by Presidential Proclamation 4210, 38 Fed. Reg. 9645 (1973). The license fee system was established pursuant to section 232(b) of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862(b) (1976), which authorizes the President to adjust the import of an article when the import of that article threatens to impair the national security. Prior to Presidential Proclamation 4210 in 1973, the authority in section 232(b) to control the import of petroleum products was implemented through the use of quotas. In 1976, the Supreme Court, in its decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), held that the oil import license fee system was authorized by section 232(b).

In addition to creating the oil import license fee system, Presidential Proclamation 4210 suspended the tariffs on petroleum products. These tariffs were reinstated in 1975 by Presidential Proclamation 4341, 40 Fed. Reg. 3965 (1975), and since 1975 a dual system of license fees and tariffs on petroleum products has existed.

Although the parties have raised numerous arguments concerning whether oil import license fees are customs duties, the Court concludes for two basic reasons that the license fees are not customs duties. First, the oil import license fee system has a fundamentally different purpose than the tariff system traditionally has had. The parties agree that tariffs are intended to raise revenue and protect domestic commerce. Yet, plaintiff overlooks that the ultimate purpose of the oil import license fee system is to protect national security. This broader purpose of the license fee system is evidenced by the fact that the complicated license fee system, rather than the mere amendment of tariffs on petroleum products, was chosen in 1973 to implement the authority in section 232(b) to adjust the import of an article when the import of the article threatens national security. Moreover, while the license fee system

was initially accompanied by the complete suspension of tariffs on petroleum products, there presently exists a dual system of license fees and tariffs on petroleum imports. This fact by itself strongly indicates that the license fee on petroleum imports has a purpose substantially different in scope than the customs duties on such products.

Secondly, plaintiff's argument regarding oil import license fees rests on the unsupported premise that all monetary exactions on imported goods constitute "customs duties." Plaintiff emphasizes the Supreme Court's observation in the *Algonquin* decision that both license fees and customs duties are monetary exactions that serve the purpose of adjusting imports. *See* 426 U.S. at 562. The Supreme Court, however, referred to both license fees *and* duties, and nowhere in its opinion did the Court suggest that license fees are in all respects the legal equivalent of customs duties. Furthermore, as defendant correctly notes, not all levies on imports are necessarily customs duties. For example, the excise taxes on alcohol and tobacco products are imposed on imports of these products, but clearly the excises are internal revenue taxes and not customs duties. In short, plaintiff has not persuasively supported its suggestion that all money exactions on imported articles must be deemed "customs duties."

Accordingly, the Court holds that section 28(a) of the 1954 Revised Organic Act of the Virgin Islands does not require the defendant to cover into the Virgin Islands Treasury the import license fees collected on Virgin Islands petroleum products transported into the United States.

C. *Scope of Relief.*

In its motion for partial summary judgment, plaintiff seeks a declaratory judgment that the defendant Secretary of the Treasury is required to cover into the Virgin Islands Treasury all customs duties collected on goods coming into

the United States from the Virgin Islands and all revenues from the excise tax levied on gasoline refined in the Virgin Islands and transported into the United States. The Court, in its decision in the related case of *Commonwealth of Puerto Rico v. Blumenthal,* C.A. 75-1035, concluded for equitable reasons that Puerto Rico was entitled to a rebate of only those taxes collected on Puerto Rican gasoline after Puerto Rico asserted its claim to the taxes in 1974. The Court does not believe, however, that the factors underlying its decision to limit the scope of relief in the *Puerto Rico* case are present in the case at bar. First of all, it appears that the Virgin Islands has only recently been governed independently of the executive branch of the federal government. Thus, unlike the Commonwealth of Puerto Rico, the Islands have not been in a position to forcefully assert a substantial claim against the Secretary of the Treasury. Secondly, the Virgin Islands has not received benefits from the Federal Highway Trust Fund at the same time that the excise tax on Virgin Islands gasoline should have been covered into the Virgin Islands Treasury.

It appearing to the Court, therefore, that plaintiff has shown good cause for the delay in asserting its claim and that the Government has not been prejudiced by such delay, the Court holds that plaintiff is entitled to a judgment declaring that the defendant is required by sections 28(a) and 28(b) of the 1954 Revised Organic Act of the Virgin Islands to cover into the Virgin Islands Treasury all customs duties collected on goods transported into the United States from the Virgin Islands and all taxes collected on gasoline refined in the Virgin Islands and transported into the United States.

/s/ Oliver Gasch
Judge

Date: October 11th, 1978

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1035

COMMONWEALTH OF PUERTO RICO, *Plaintiff*,

v.

W. MICHAEL BLUMENTHAL, *Defendant*.

ORDER

[Filed October 10, 1978]

Upon consideration of the parties' cross-motions for summary judgment, the points and authorities filed in support thereof and opposition thereto, the argument of counsel in open Court, the entire record herein, and for the reasons set forth in the Court's Memorandum issued this same day, it is by the Court this 7th day of October, 1978,

ORDERED that plaintiff's motion for summary judgment be, and hereby is, granted in part and denied in part; and it is further

ORDERED that defendant's cross-motion for summary judgment be, and hereby is, denied; and it is further

ORDERED that the defendant Secretary of the Treasury shall rebate to the Treasury of Puerto Rico all federal gasoline excise taxes collected since September 13, 1974 until the present on gasoline refined in Puerto Rico and transported to the United States; and it is further

ORDERED that the defendant Secretary of the Treasury shall cover into the Treasury of Puerto Rico all federal gasoline excise taxes collected in the future on gasoline refined in Puerto Rico and transported to the United States.

/s/ OLIVER GASCH
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1035

COMMONWEALTH OF PUERTO RICO, *Plaintiff*,

v.

W. MICHAEL BLUMENTHAL, *Defendant*.

MEMORANDUM

[Filed October 10, 1978]

Presently before the Court are the parties' cross-motions for summary judgment. Plaintiff, the Commonwealth of Puerto Rico, asserts that it is entitled to a rebate of all gasoline excise taxes that have been levied and collected on gasoline refined in Puerto Rico and transported to the United States. Plaintiff specifically relies on a statutory provision originally enacted as section 9 of the Jones Act,[1] and which provides that "all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and Transported to the United States, or consumed in the island shall be covered into the Treasury of Puerto Rico."[2] Defendant, the Secretary of the Treasury, contends that the foregoing provision was intended to apply only to revenue collected under so-called "equalization" taxes imposed on goods produced in Puerto Rico and transported to the United States. Defendant argues further that the gasoline excise tax, insofar as it applies to gasoline transported to the United States from Puerto Rico, is not an equalization tax. Alternatively, defendant contends that the Federal-Aid Highway Act of

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[1] 39 Stat. 951 (1917).

[2] 48 U.S.C. § 734 (1970), also codified at 26 U.S.C. § 7652(a)(3) (1976).

1956[3] bars the covering over to Puerto Rico of any revenues from the Gasoline tax.

The Court, having considered the arguments presented by both parties, and for the reasons discussed below, concludes that the cover over provision requires that taxes collected on Puerto Rican gasoline[4] be covered into the Puerto Rican Treasury. In short, defendant's narrow construction of the cover over provision is contrary to the provision's plain meaning and is not supported by the provision's legislative history. Moreover, defendant's attempt to distinguish the excise tax from the excises on Puerto Rican tobacco and alcohol (the revenues from which are covered into the Puerto Rican Treasury) does not withstand close scrutiny. Nevertheless, the Court concludes that plaintiff's motion for summary judgment should not be granted in its entirety. The Court believes that plaintiff is entitled to a covering over only of those gasoline tax revenues collected on Puerto Rican gasoline since September, 1974, when Puerto Rico first asserted its claim to the Secretary of the Treasury for these tax revenues.

BACKGROUND

A. The Gasoline Excise Tax.

At the outset, it is important to emphasize that the focus of the case at bar is the excise tax imposed on gasoline. This tax was originally enacted in 1932, and its present codification provides that "[t]here is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon." 26 U.S.C. § 4081(a) (1976). The statutory scheme does not

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[3] 70 Stat. 374 (1956).

[4] Throughout this memorandum, the term "Puerto Rican gasoline" refers to gasoline refined in Puerto Rico and transported to the United States.

define importer, nor does it otherwise specify whether Puerto Rico gasoline is within the scope of the tax. In any event, the tax has been levied on gasoline refined in Puerto Rico and shipped to the United States, and defendant estimates that $350,000,000 of revenues have been collected from the tax on Puerto Rican gasoline.[5]

Although the gasoline tax is levied at the time of sale, the tax is clearly a manufacturer's excise tax and not a retail sales tax. The taxing provision provides for the imposition of the tax if the producer or importer consumes the gasoline for his own use and does not sell it. *See* 26 U.S.C. § 4082(c) (1976). Moreover, in *Gurley v. Rhoden,* 421 U.S. 200 (1975), the Supreme Court, in holding that the incident of the gasoline tax is on the producer (or importer) and not the consumer, recognized that the tax is one on production.

B. Relevant Tax Provisions Pertaining to Puerto Rico.

In support of its claim that revenues from the excise on Puerto Rico gasoline should be rebated to the Treasury of Puerto Rico, plaintiff relies on the cover over provision originally enacted in 1917 as section 9 of the Jones Act. To understand the arguments raised by both parties, however, it is necessary to briefly review other tax provisions specifically applicable to Puerto Rico.

The United States originally obtained Puerto Rico in 1899. In 1900, Congress passed the Foraker Act,[6] which established a general taxing scheme for Puerto Rico. The Act provided several sources of revenue for the Puerto Rican Treasury: taxes levied by the permanent govern-

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[5] *See* Statement of Material Facts as to Which Defendant Contends There is no Genuine Issue, ¶ 16. Gasoline has been refined in Puerto Rico and transported to the United States since 1956.

[6] 31 Stat. 77 (1900).

ment of Puerto Rico, once established, under its own locally applicable internal revenue laws; custom duties imposed on goods entering Puerto Rico from countries other than the United States; and revenue from an equalization tax imposed on goods entering Puerto Rico from the United States. Section 3 of the Foraker Act imposed this equalization tax on goods from the United States going into Puerto Rico, and it also imposed an equalization tax on goods from Puerto Rico going into the United States. This latter tax was deemed necessary because goods entering the United States from Puerto Rico were subject to neither custom duties imposed on goods imported from foreign countries nor the excise taxes levied on goods manufactured in the United States.[7] Thus, without an equalization tax, Puerto Rican manufacturers who transported their goods to the United States would have a competitive advantage over American manufacturers subject to federal manufacturers excise taxes levied in the United States. Section 3 of the Foraker Act was intended to eliminate this competitive gap; it specifically provided that Puerto Rican goods transported to the United States should be subject to a "tax equal to the internal-revenue tax imposed in the United States upon like articles of merchandise of domestic manufacture."[8]

The Foraker Act also provided that the revenue from the equalization tax on goods shipped from Puerto Rico to the United States initially would be held for the benefit of Puerto Rico. This provision expired upon the establishment of the government of Puerto Rico, however, and the revenue

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[7] Section 3 of the Foraker Act provided that articles should enter Puerto Rico from the United States and the United States from Puerto Rico duty free. Section 14 of the Act provided generally that the internal revenue laws of the United States did not apply in Puerto Rico. *See* 48 U.S.C. § 734 (1970).

[8] 26 U.S.C. § 7652(a)(1) (1976).

from the equalization taxes thereafter went into the general Treasury of the United States.

In 1917, Congress passed the Jones Act, which was primarily intended to give increased rights and governmental powers to Puerto Rico. More importantly for the purposes of the case at bar, section 9 of the Jones Act provided that "all taxes collected under the internal revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed in the island shall be covered into the Treasury of Porto Rico." Congress enacted this cover over provision to compensate for the revenue loss to Puerto Rico resulting from disruption of foreign trade with Puerto Rico during World War I. Historically, Puerto Rico relied on imports from European countries, but the disruption in trade during World War I forced Puerto Rico to rely increasingly on imports from the United States. Because duties on imports from Europe were the primary source of revenue for Puerto Rico, however, and because imports from the United States were made duty free by the Foraker Act, an additional source of revenue for Puerto Rico became necessary. The House Committee Report on the Jones Act stated:

> The loss of this revenue has seriously embarrassed the Porto Rican Government, and it is believed to be but just and fair that it should receive the internal-revenue taxes collected upon its products, whether those products are used in Porto Rico or produced in Porto Rico and transported to and used in the United States.

H. Rep. 77, 64th Cong., 1st Sess. 1-2 (1916). To make clear the intended broad scope of the cover over provision, the Senate Committee amended it to apply to internal revenue taxes on goods consumed in Puerto Rico but which had been produced elsewhere.[9] Thus, as finally enacted, section 9

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[9] *See* S. Rep. 579, 64th Cong., 1st Sess. 2 (1916).

provided for the covering over to Puerto Rico of all internal revenue taxes on products either consumed in Puerto Rico or produced in Puerto Rico and transported to the United States.[10]

C. The Federal Excise Taxes on Tobacco and Alcohol.

The excise taxes on tobacco and alcohol are relevant to a resolution of the issue before the Court. A considerable amount of tobacco and alcohol produced in Puerto Rico is transported to the United States and subjected to taxation upon shipment into the United States; and, pursuant to section 9 of the Jones Act, the revenue from the excise taxes on Puerto Rican tobacco and alcohol has always been covered into the Puerto Rican Treasury. During 1977, the United States' excise taxes on Puerto Rican rum and Puerto Rican tobacco amounted to approximately $134 million and $9 million, respectively.[11]

The excise tax provision regarding alcohol provides for a tax on "all distilled spirits in bond or produced in or imported into the United States. . . ." 26 U.S.C. § 5001 (1976).[12] The excise tax provision regarding tobacco pro-

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[10] In 1950, the Puerto Rican Federal Relations Act was enacted. 64 Stat. 319 (1950). This Act led to the creation of the Commonwealth of Puerto Rico as it now exists. It also continued in force and effect the Jones Act of 1917, which itself had continued in effect the significant tax provisions of the Foraker Act of 1900. Thus, the cover over provision of section 9 of the Jones Act, as well as the equalization tax provision originally contained in section 3 of the Foraker Act on Puerto Rican goods shipped to the United States, have remained in effect to the present.

[11] *See* Exhibit C to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment.

[12] Section 5001(a)(10) of Title 26, which was not discussed by either of the parties, specifically provides that "[e]xcept as pro-

vides for a tax on cigars, cigarettes and other tobacco products "manufactured in or imported into the United States." 26 U.S.C. § 5701 (1976).[13] As discussed in greater length below, defendant contends that the excises on Puerto Rican tobacco and alcohol are levied pursuant to the equalization tax provision of section 3 of the Foraker Act and not pursuant to sections 5001 and 5701 of the Internal Revenue Code. At the same time, defendant argues that the excise on Puerto Rican gasoline is levied pursuant to section 4081 of the Internal Revenue Code and not pursuant to section 3 of the Foraker Act. This asserted distinction between the excises on Puerto Rican tobacco and alcohol and the excise on Puerto Rican gasoline is critical to defendant's argument that the revenue from the excise on Puerto Rican gasoline is not within the scope of the cover over provision of section 9 of the Jones Act.

MERITS

A. The Scope of the Cover Over Provision.

Plaintiff's argument in support of its claim that the revenue from the excise on Puerto Rican gasoline should be covered into the Puerto Rican Treasury is direct in its

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vided in section 5314, upon bay rum, or any article containing distilled spirits, brought from Puerto Rico into the United States for consumption or sale there is hereby imposed a tax on the spirits contained therein at the rate imposed on distilled spirits produced in the United States." This provision was enacted in 1909. *See* 35 Stat. 594.

[13] Again, neither of the parties addressed a subsection of section 5702 pertaining to Puerto Rico. Subsection (b) (*1*) defines "importer" as "any person in the United States to whom nontaxpaid tobacco products . . . manufactured in a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States are shipped or consigned . . . ." This definitional provision apparently was first enacted in the Revenue Act of 1954.

approach. Plaintiff argues with considerable force that the meaning of the cover over provision is plain on its face and clearly extends to revenues from the excise on Puerto Rican gasoline. Section 9 of the Jones Act, as it is now codified,[14] refers to "*all taxes* collected under *the internal revenue laws of the United States* on articles produced in Puerto Rico and transported to the United States . . . ." (Emphasis added.) The provision is all-inclusive in scope; the meaning of the term "all taxes" could not be clearer, and the meaning of the term "the internal revenue laws of the United States" seems equally clear. Without question, the excise levied on Puerto Rican gasoline, like the excises on Puerto Rican tobacco and alcohol, are "taxes collected under the internal revenue laws of the United States." Accordingly, the plain meaning of the provision would appear to require the covering into the Puerto Rican Treasury of all taxes collected on Puerto Rican gasoline.

In an effort to overcome the cover over provision's plain meaning, defendant presents several arguments, none of which are meritorious. In sum, defendant contends that the meaning of the provision is not clear on its face and the provision's legislative history and historical context indicate that it was intended to provide only for the covering over of revenues collected pursuant to the equalization tax provision of section 3 of the Foraker Act. At the outset, defendant contends that the term "internal revenue laws of the United States" is inherently ambiguous and cannot be presumed to include all internal revenue laws. Yet, in view of the provision's sweeping reference to "all taxes," this argument by defendant is at best a strained one. The inclusion of a second "all" immediately preceding the term "internal revenue laws" would appear unnecessarily repetitive and awkward.

Nevertheless, defendant proceeds to argue that the legislative history of section 9 of the Jones Act, as well as the

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[14] *See* 48 U.S.C. § 734; 26 U.S.C. § 7652(a)(3).

historical circumstances surrounding the section's enactment, make clear that the cover over provision was intended to encompass only revenue from equalization tax levies. Defendant's reliance on legislative history is noticeably weak, and defendant has not cited any portion of the legislative history directly supporting its narrow construction of the cover over provision. Defendant's only reference to the legislative history of any significance is a quotation from the House Committee Report, as follows:

> It appears that the present rule is to pay into the Porto Rican Treasury those taxes that are collected under the internal-revenue laws of the United States on articles produced and used in Porto Rico, and into the Treasury of the United States internal-revenue taxes collected on articles produced in Porto Rico but transported to the Unitead States. In the opinion of your committee *these taxes* should all be covered into the treasury of Porto Rico.

H. Rep. 77, 64th Cong., 1st Sess. 1-2 (emphasis added by defendant). Defendant concludes that it is clear "that the phrase 'these taxes' as employed in the above passage refers only to revenues from the 'equalization' taxes then being collected on articles produced in Puerto Rico and transported to the United States."[15] In the same manner, defendant relies on the historical circumstances at the time of the enactment of section 9, arguing that because the Foraker Act section 3 equalization taxes were the only taxes remaining in 1917 capable of being covered over to Puerto Rico but not then being covered over, then Congress must have intended to cover over *only* the then-existing equalization taxes on Puerto Rican goods being transported to the United States.

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[15] Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 9.

It is clear, however, that defendant is urging a leap in reasoning that is not supported either by the wording of section 9 or by its legislative history. Defendant no doubt is correct in suggesting that Congress, in seeking additional revenue for Puerto Rico, focused on the specific taxes affecting Puerto Rico that were not then being covered into the Puerto Rican Treasury. In 1917, these taxes included the equalization taxes on Puerto Rican goods transported to the United States. But, defendant is asking the Court to read into the broad language of the cover over provision a Congressional intent to exclude from the provision's scope internal revenue taxes different from the equalization taxes and not in existence in 1917. There is no support for such an inference. In fact, the provision itself expressly provides for the covering over of internal revenue taxes that clearly are not equalization taxes, *i.e.*, internal revenue taxes on goods produced and consumed in Puerto Rico. The Senate Committee Report also reflects an intent to make the provision broad enough to include all internal revenue taxes on goods connected with Puerto Rico.[16] Moreover, defendant's argument that the provision be interpreted as limited to equalization taxes in effect in 1917 is contrary to the well-established principle that an all-inclusive statutory provision should be presumed to cover persons or things that subsequently fall within its cope. *See, e.g., DeLima v. Bidwell*, 182 U.S. 1, 197 (1901). In the face of the broad language of the cover over provision, defendant has failed to show that the excise tax on Puerto Rican gasoline should not be considered within the scope of the provision.

The weakness of defendant's construction of the cover over provision is conclusively demonstrated by the illogic of defendant's asserted distinction between the excises on Puerto Rican tobacco and alcohol and the excise on Puerto

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[16] *See* note 9 *supra* and accompanying text.

Rican gasoline. Consistent with his position that the cover over provision extends only to equalization taxes, defendant argues that the excises on Puerto Rican tobacco and alcohol, but not the excise on Puerto Rican gasoline, are equalization tax levies. In other words, defendant argues that the excises on Puerto Rican tobacco and alcohol are not imposed pursuant to sections 5001 and 5701 of the Internal Revenue Code. This argument fails for two reasons, however. First, both sections 5001 and 5701 appear to contain subsections specifically extending the excise taxes levied by sections 5001 and 5701 to tobacco and alcohol produced in Puerto Rico and transported to the United States.[17]

Secondly, and more importantly, sections 5001 and 5701, like section 4081 (which provides for the gasoline excise tax), each expressly extend to products imported into the United States. Defendant attempts to negative this fact, however, by asserting that goods shipped from Puerto Rico to the United States traditionally have not been considered as "imported into the United States." This tradition allegedly derives from the decision of the Supreme Court in the Insular Cases that goods imported from a foreign country. The Court held that Puerto Rico is not a foreign country for purposes of the excise taxes. *See, e.g., Downes v. Bidwell,* 182 U.S. 244 (1901). According to defendant, although the term "foreign country" has since been removed from the alcohol and tobacco excise provisions, the reference in the provisions to "imported" goods has been administratively construed as excluding goods from Puerto Rico. Yet, even assuming that such an administrative construction exists and is controlling, defendant completely ignores that the same administrative construction would necessarily apply to the gasoline excise tax provision in section 4081, which also extends to "imported"

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[17] *See* notes 12 and 13 *supra*.

gasoline. If, as defendant contends, alcohol and tobacco shipped from Puerto Rico to the United States is not "imported" for the purposes of sections 5001 and 5701, then gasoline shipped from Puerto Rico to the United States cannot logically be considered "imported" within the meaning of section 4081. In that event, the excise on Puerto Rican gasoline must be viewed as being levied pursuant to the equalization tax provision of section 3 of the Foraker Act. In attempting to distinguish the excises on Puerto Rican tobacco and alcohol from the excise on Puerto Rican gasoline, defendant has proven too much.

In sum, defendant's limited interpretation of the cover over provision finds no support in, and in fact is contrary to, the provision's language and legislative history. Moreover, defendant's interpretation is premised on a distinction lacking any reasonable basis. Thus, the Court must respect the express language of the cover over provision. As the Supreme Court recently observed, "[i]t is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *Tennessee Valley Authority v. Hill,* 46 U.S.L.W. 4673, 4682 (June 15, 1978). The plain language of the cover over provision compels the conclusion that the excise tax imposed on gasoline refined in Puerto Rico and transported to the United States be covered into the Treasury of Puerto Rico.

B. The Federal-Aid Highway Act of 1956.

Defendant alternatively argues that the provisions of the Federal-Aid Highway Act of 1956, 70 Stat. 374 (1956), bars the covering over into the Puerto Rican Treasury of any revenues from the gasoline excise tax. The Federal-Aid Highway Act established a National Highway Trust Fund as a mechanism for federal aid to interstate highway

construction. In pertinent part, section 209(c)(1)(A) of the Act provides that:

> There is hereby appropriated to the Trust Fund, out of money in the Treasury not otherwise appropriated, amounts equivalent to the following percentages of the taxes received in the Treasury . . . under the following provisions of the Internal Revenue Code . . .
>
> (A) 100 percent of taxes received after June 30, 1956, under . . . [section] 4081 (tax on gasoline).

Defendant asserts that the foregoing provision bars the use of gasoline tax revenues for any purpose other than interstate highway construction and thereby precludes the covering over of any gasoline tax revenues to the Treasury of Puerto Rico.

In short, the language of the Federal-Aid Highway Act simply does not create the bar that defendant asserts it creates. Defendant concedes that the Act does not directly earmark gasoline tax revenues for highway construction; *i.e.*, the monies collected from the gasoline tax are not the direct source of the aid distributed for highway construction. Instead, section 209(c)(1)(A) provides for an appropriation to the Trust Fund "out of money in the Treasury not otherwise appropriated, [an] amount[] equivalent to . . . 100 percent of taxes received" under the tax on gasoline. It is clear from the face of section 209(c)(1)(A) that its terms establish a measure for amounts to be appropriated to the Highway Trust Fund, and do not bar direct appropriations of gasoline tax revenues for purposes other than highway construction.

Thus, although the covering of taxes on Puerto Rican gasoline with the Puerto Rican Treasury might be inconsistent with the policies underlying the Highway Act, it is not in conflict with the terms of the Act itself. No serious

argument can therefore be made that the Highway Act impliedly repealed the statutory provision directing the covering over of taxes on Puerto Rican gasoline. *See Tennessee Valley Authority v. Hill*, 46 U.S.L.W. 4673, 4683. In the final analysis, the Highway Act did not alter the directive that "all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States . . . be covered into the Treasury of the United States."

SCOPE OF RELIEF

Plaintiff requests the Court, in the exercise of its equity power, to order the Secretary of Treasury to rebate to the Treasury of Puerto Rico all internal revenue taxes that have been collected on Puerto Rican gasoline shipped to the United States. The Court concludes however, that because of the significant delay of plaintiff in asserting its claim, such broad retroactive relief is not justified.

The Government of Puerto Rico, without any apparent good cause, waited nearly twenty years to assert its claim that the cover over provision requires that the taxes levied on Puerto Rican gasoline be covered into the Puerto Rican Treasury. The parties agree that the shipment to the United States of gasoline refined in Puerto Rico began in 1956. At that time, both the cover over provision, which had been enacted in 1917, and the gasoline excise tax, which had been enacted in 1932, were in effect. Yet, it appears that plaintiff did not present any claim for the tax revenues collected on Puerto Rican gasoline until September, 1974.[18] There is no evidence that between 1956 and 1974 the Government of Puerto Rico lacked either the power or the knowledge of facts necessary to assert its claim. At oral hearing, counsel for plaintiff candidly admitted that he

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[18] *See* Statement of Material Facts as to Which Plaintiff Contends There is no Genuine Issue, ¶ 9.

was unable to explain why the Government of Puerto Rico had delayed so long in asserting its claim.

The delay by plaintiff in the assertion of its claim is not insignificant. Plaintiff is seeking the rebating of approximately $350,000,000 in tax revenues that have been collected on Puerto Rican gasoline.[19] Moreover, plaintiff does not dispute that since 1956 Puerto Rico has received substantial benefits from the Trust Fund established by the Federal-Aid Highway Act.[20] Viewing this situation realistically, it is possible that if Congress had been on notice that Puerto Rico was entitled to the revenue from excise tax on Puerto Rico gasoline, then Congress might have chosen to alter either the scope of the cover over provision or the amount of the appropriations to Puerto Rico from the Highway Trust Fund. Therefore, by having delayed the assertion of its claim to the gasoline tax revenues, Puerto Rico could be receiving a huge windfall if all past taxes collected on Puerto Rico gasoline are rebated to the Puerto Rican Treasury. Given the total absence of any explanation for the eighteen-year delay in the assertion of the claim, the Court believes that an order requiring the Secretary to rebate all past taxes collected on Puerto Rican gasoline would be manifestly unjust. The Court's exercise of its equitable discretion in this manner is consistent with the well-established principle that an equitable claim that is prejudicially untimely is barred by laches. Plaintiff cannot be allowed to enforce its claim when it "has inexcusably slept on [its] rights so as to make a decree against the defendant unfair." *Holmberg* v. *Armbrecht,* 327 U.S. 392, 396 (1946).

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[19] *See* note 5 *supra* and accompanying text.

[20] *See* Statement of Material Facts as to Which Defendant Contends There is no Genuine Issue, ¶ 22; Plaintiff's Response to Defendant's Statement of Material Facts as to Which Defendant Contends There is no Genuine Issue, ¶ 8.

Accordingly, the Court concludes that the Secretary should rebate to the Treasury of Puerto Rico all taxes collected on Puerto Rican gasoline since September 13, 1974 until the present, and the Secretary shall cover into the Puerto Rican Treasury all taxes collected on Puerto Rican gasoline in the future.

/s/ OLIVER GASCH
Judge

Date: October 7th, 1978

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1980

No. 79-1021

Civil Action No. 76-0916

VIRGIN ISLANDS

v.

W. MICHAEL BLUMENTHAL, Secretary,
Department of the Treasury, *Appellant*

No. 79-1022

Civil Action No. 76-0916

VIRGIN ISLANDS, *Appellant*

v.

W. MICHAEL BLUMENTHAL, Secretary,
Department of the Treasury

Before: McGowan and Wald, Circuit Judges; Pratt*, United States District Judge for the District of Columbia.

ORDER

[Filed December 18, 1980]

On consideration of the petition for rehearing filed by the Virgin Islands, it is

ORDERED, by the Court, that the aforesaid petition is denied.

Per Curiam
For the Court:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

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* Sitting by designation pursuant to Title 28 U.S. Code Section 292(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1980

No. 79-1021

Civil Action No. 76-0916

VIRGIN ISLANDS

v.

W. MICHAEL BLUMENTHAL, Secretary,
Department of the Treasury, *Appellant*

No. 79-1022

Civi Action No. 76-0916

VIRGIN ISLANDS, *Appellant*

v.

W. MICHAEL BLUMENTHAL, Secretary,
Department of the Treasury

Before: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva and Edwards, Circuit Judges; Pratt*, United States District Judge for the District of Columbia.

ORDER

[Filed December 18, 1980]

The suggestion for rehearing *en banc* filed by the Virgin Islands having been transmitted to the full Court and no judge in regular active service, and no member of the panel which considered these cases, having requested a vote with respect thereto, it is

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* Sitting by designation pursuant to Title 28 U.S. Code Section 292(a).

ORDERED by the Court, *en banc*, that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judge Ginsburg did not participate in this order.

APPENDIX F

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

Feb. 3, 1941

MEMORANDUM for the Secretary.

You have requested my advice concerning the disposition of certain internal revenue taxes levied and collected on articles brought into the United States from the Virgin Islands. Specifically, it has been proposed to you that you request the President to promulgate, pursuant to authority contained in section 5 of the act of March 3, 1917 (39 Stat. 1132), regulations which would make available to the municipalities of the Virgin Islands the United States internal revenue taxes collected on articles brought in from the Virgin Islands. This proposal immediately encounters rulings of the Comptroller of the Treasury and the Attorney General which, if applied, would require its rejection.

Sections 3, 4, and 5 of the act of March 3, 1917, an act to provide a temporary government for the Virgin Islands, read in part as follows:

> "Sec. 3. That on and after the passage of this Act there shall be levied, collected, and paid upon all articles coming into the United States or its possessions, from the West Indian Islands ceded to the United States by Denmark, the rates of duty and internal-revenue taxes which are required to be levied, collected, and paid upon like articles imported from foreign countries; *Provided,* That all articles, the growth or product of, or manufactured in such islands from materials the growth or product of such islands or of the United States, or of both, or which do not contain foreign materials to the value of more than twenty per centum of their total value, upon which no draw-

> back of customs duties has been allowed therein, coming into the United States from such islands shall hereafter be admitted free of duty.
>
> "Sec. 4. That until Congress shall otherwise provide all laws now imposing taxes in the said West Indian Islands, including the customs laws and regulations, shall, in so far as compatible with the changed sovereignty and not otherwise herein provided, continue in force and effect, except that articles the growth, product, or manufacture of the United States shall be admitted there free of duty: *Provided,* That upon exportation of sugar to any foreign country, or the shipment thereof to the United States or any of its possessions, there shall be levied, collected, and paid thereon an export duty of $6 per ton of two thousand pounds irrespective of polariscope test, in lieu of any export tax now required by law. * * *
>
> "Sec. 5. That the duties and taxes collected in pursuance of this Act shall not be covered into the general fund of the Treasury of the United States, but shall be used and expended for the government and benefit of said islands under such rules and regulations as the President may prescribe."

I am advised that, in spite of the provision of section 5 above, internal revenue taxes collected on articles coming into the United States from the Virgin Islands have been and are being credited to the United States pursuant to Treasury Decision 4770 (Internal Revenue) of October 25, 1937, which is based on an opinion rendered by a former Attorney General under date of June 9, 1926 (35 Op. Atty. Gen. 63). The Attorney General in his opinion did not consider the nature or extent of the rules and regulations which the President may promulgate under the act above quoted, but on the question presented to him decided that duties and taxes collected on articles coming into the

United States from the Virgin Islands are not collected "in pursuance of" that act but rather under the general laws governing the collection of duties and taxes, and are therefore to be treated as general revenue collections of the United States. He cited a decision to similar effect rendered by the Comptroller of the Treasury (23 Comp. Dec. 574).

In view of the fact that the ruling of the Comptroller of the Treasury has stood since April 14, 1917, and that of the Attorney General since June 9, 1926, apparently without having been seriously questioned, and since the actual disposition of the internal revenue taxes in question must have come to the attention of the Congress periodically upon the appropriation of moneys to supply deficiencies in funds needed for the administration of the Islands, I do not feel that I can now render an opinion to the effect that the statutes require a different disposition of the proceeds of those taxes. I do, however, feel that the construction placed on the statute by those two officers was originally incorrect and I have set forth hereinafter the grounds upon which I would have arrived at a different conclusion.

Referring first to the Comptroller's decision, I quote the following:

> "While the language of section 5 of the act might be broad enough to include the taxes and duties referred to in section 3, I am of opinion that such was not the intent of Congress and that such construction of the provision is not required. You are advised, therefore, that the provisions of section 5 refer only to duties and taxes collected in pursuance of the provisions of section 4 * * * *."

As to the taxes and duties described in section 3, he stated that

> "Such duties and taxes are not collected 'in pursuance of this act', but under the general laws of the United

States relative to the collection of duties and taxes on articles imported from foreign countries * * *."

First, the Comptroller construes the expression "in pursuance of this act" to apply to the collections described in section 4 but not to those provided for in section 3, his reason being that the duties and taxes described in section 3 are collected pursuant to other laws, namely, the general customs and revenue laws of the United States. I think the distinction apparently relied on does not exist, for if the duties and taxes described in section 3 are collected pursuant to other laws (the general laws of the United States), then certainly those described in the principal portion of section 4 are likewise collected pursuant to other laws, namely, local laws of the then West Indian Islands. Secondly, if section 5 were intended by Congress to apply only to the duties and taxes described in section 4, namely those collectible under existing local law and the export duty on sugar prescribed in the proviso, it appears logical either that section 5 would have contained a reference to section 4 rather than to "this act" or that the provision for disposition of the collections would have been included in section 4. And if it be argued further, to avoid the effect of my first point, that section 5 was inserted solely to take care of the export duty prescribed in the proviso to section 4, then the presumption that Congress would have attached the provision to section 4 is even stronger.

Thirdly, it can hardly be argued that the duties and taxes provided in section 3 were not, at the time of the Comptroller's decision, or at least on the effective date of the section, collectible "in pursuance of" that act. The language of section 3 that "there shall be levied, collected, and paid" the prescribed taxes is certainly sufficient to impose tax liability; and I find no other statute than providing for the collection of such duties and taxes after the islands ceased to be foreign territory. The general tariff and revenue laws

prescribed the rates of duty and internal revenue taxes applicable to "like articles imported from *foreign countries*"; this act adopted by reference those rates of duty and internal revenue taxes and provided that they be "levied, collected, and paid upon all articles coming into the United States or its possessions from the West Indian Islands ceded to the United States", which had then ceased to be foreign countries.

Referring to the opinion of the Attorney General, I find no more convincing the basis of that decision. The opinion appears to express substantially the opinion of the Comptroller and to point out that no *other* statutory provision was found providing that the proceeds of these duties and taxes should be expended for the government and benefit of the Virgin Islands.

A further question must be considered, in addition to those touched on in the two rulings cited. Chapter 26 of the Internal Revenue Code, levying taxes on distilled spirits and alcoholic compounds, refers in section 2800(a)(4)(B) to section 3350 of the Code, which reads in part as follows:

> "(a) Taxes Imposed in the United States.—Except as provided in section 3123, there shall be levied, collected, and paid in the United States, upon articles coming into the United States from the Virgin Islands, a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture."

It will be noted that while section 3 of the 1917 act applied the rates of duty and internal revenue taxes imposed upon like articles imported from foreign countries, section 3350 of the Code covers only the internal revenue tax and provides that it shall be the same as that imposed on like articles of domestic manufacture. Section 3350 was derived from section 1304 of the Revenue Act of 1913 (40 Stat.

1057), which was preceded by section 1000 of the Revenue Act of 1917 enacted after the act of March 3, 1917, and subsequent to the Comptroller's decision.

In the Attorney General's opinion, he recognized the existence of both section 3 of the 1917 act and section 1304 of the Revenue Act of 1918; he said specifically that certain articles "became subject in the United States, under the provisions of section 1304, to the tax imposed by" certain sections of the revenue laws, and at the same time stated that "consideration must be given to the act of March 3, 1917 * * * which is still in effect." He did not, however, feel called upon to indicate what he considered to be the effect of section 1304 on section 3, his contention being, as I understand it, that neither the duties nor the taxes described in section 3 are collected pursuant to either section but rather under the general tariff and revenue laws. Inasmuch as I would construe section 3 as the provision pursuant to which the duties and taxes are collected, however, it is necessary for me to go further and consider the effect of section 1304 on that construction.

The reports of the Senate and House Committees which passed on section 1000 of the Revenue Act of 1917 and carried it over as section 1304 of the Revenue Act of 1918 are silent as to its intended effect on section 3. Section 3 of the 1917 act, forming as it does a part of the act providing for completing the acquisition of the Islands, has a logical purpose, namely, to prescribe the liability under the tariff and revenue laws of goods continuing to flow from the Islands which were formerly foreign territory but which thenceforth were to be possessions of the United States. While it served to allow certain products of the Islands to be admitted to the United States free of duty, it also served otherwise to impose on articles brought in from the Virgin Islands a tax liability similar to that of articles imported from foreign countries. Thus section 3 constituted the basic or organic provision fixing that portion of the relationship between the United States and its

new possessions which concerned commerce flowing from the Islands to the United States. Thereafter, by the enactment of section 1000 of the Revenue Act of 1917 and its continuation as section 1304 of the Revenue Act of 1918, that organic provision was amended to the extent of the inconsistency, namely, that *internal revenue* taxes imposed were to be determined by reference to those imposed on like goods of *domestic manufacture,* and was supplemented to the extent that section 1304 contains now provisions concerning reciprocal exemptions in some cases.

This appears to be the only manner in which the intention of Congress, in the enactment of section 1000 and section 1304, may logically be shown. The result is that the act of March 3, 1917 still constitutes the basis provision for the collection of duties and taxes and stands amended in part and supplemented by section 1304. Thus, if I am correct in my construction of the act of March 3, 1917 itself, the duties and taxes collected today are collected pursuant to that basic authority, which includes the direction in section 5 for the disposition of the proceeds.

Assuming the applicability of section 5 of the 1917 act, the duties and taxes collected on articles brought in from the Virgin Islands are not to be paid into the general fund of the Treasury, but are to be used and expanded for the government and benefit of the Virgin Islands, under such rules and regulations as the President may prescribe. It would therefore be appropriate for the President to direct that these funds be made available to the municipalities of the Virgin Islands, and it would be merely a matter of fiscal administration to transfer the funds to the Treasury of the Virgin Islands and have them placed to the credit of the account of the municipalities.

/s/ NATHAN R. MARGOLD
Solicitor

APPENDIX G

June 30, 1975

Honorable Antonin Scalia
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530

Dear Mr. Scalia:

The Governor of the Virgin Islands has asked this Department to request a ruling from the Department of Justice on the question of whether Federal excise taxes collected on the sale in the United States of gasoline and other petroleum products which have been manufactured in the Virgin Islands should be paid into the treasury of the Virgin Islands.

In 1954 the United States Congress enacted a Revised Organic Act for the Virgin Islands 68 Stat 497. Section 28(b) of that Act to add a new fiscal provision dealing with the Virgin Islands. This is now codified in Section 7652 (b)(3) of the Internal Revenue Code. This amendment, in effect, provides in pertinent part:

> [T]he Secretary [of the Treasury] shall determine each year the amount of all taxes imposed by, and collect during the fiscal year under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States. The amount so determined less 1 percent and less the estimated amount of refunds or credits shall be subject to disposition as follows:
>
> (A) There shall be transferred and paid over to the government of the Virgin Islands from the amounts so determined a sum equal to the total amount of the

> revenue collected by the government of the Virgin Islands during the fiscal year . . .

Subsection (b)(1) of Section 7652 of the Internal Revenue Code imposes "in the United States, upon articles coming into the United States from the Virgin Islands a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture."

The question is, therefore, whether excise taxes imposed on the sale in the United States of gasoline and other petroleum products which were refined in the Virgin Islands and transported to the United States should be paid into the Virgin Island Treasury in accordance with Section 7652(b)(3) of the Internal Revenue Code.

The other question the Governor has asked us to submit to you for an opinion is related to the first and involves the matter of disposition of the proceeds of customs duties levied by Congress on inhabitants of the Virgin Islands; i.e. customs duties on goods coming into the United States from the Virgin Islands. Section 28(a) of the Revised Organic Act for the Virgin Islands, 48 U.S.C. 1642 provides:

> The proceeds of customs duties, the proceeds of the United States income tax, and the proceeds of any tax levied by the Congress on the inhabitants of the Virgin Islands, the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands, less the cost of collecting all of said duties, taxes, and fees, shall be covered into the treasury of the Virgin Islands . . .

In your opinion letter of November 14, 1974, to the Administrator of the Federal Energy Administration, at page 3, footnote 2, you seem to suggest that duties collected on goods coming into the United States from the Virgin Islands would not be paid into the Virgin Island

treasury. This opinion is in turn based upon a 1926 opinion of the Attorney General, 35 Ops. Atty. Gen. 63, which, in turn simply follows with approval a 1917 opinion of the Comptroller of the Treasury, 23 Comp. Dec. 574. This decision dealt with the question of the distribution of duties on goods coming into the United States from the Virgin Islands under Section 5 of the Act of March 3, 1917 48 U.S.C. 1396. That Section provided for the use and expenditure of duties collected in pursuance of that Act for benefit of the Islands. The Comptroller's decision in effect held that duties on goods coming in the United States from the Virgin Islands were not collected in pursuance of the Act of March 3, 1917, and, therefore, went into the general funds of the U.S. Treasury and were not available for the Virgin Islands.

Reliance by the Department of Justice on this 1917 opinion appears to ignore the fact that this provision, authorizing use and expenditure only of duties collected in pursuance of the March 3, 1917 Act has been impliedly repealed. The duties now authorized by Section 28(a) of the Revised Virgin Island Organic Act to be paid into the Virgin Island treasury are not limited to duties collected in pursuance of that or any other Act. The authority is generally for the payment of "the proceeds of customs duties" without limitation as to the legal authority under which they were collected.

The Comptroller General of the United States appears to have construed the fiscal provisions of the 1954 Revised Organic Act for the Virgin Islands as so providing. In his letter of November 27, 1953 to the Chairman of the [p. 3] Senate Interior and Insular Affairs Committee, Senate Report No. 1271, 33rd Cong. 2d Sess. April 29, 1953, pp. 17-20, he comments on the wisdom of affording the Virgin Islands the same treatment as Puerto Rico enjoys, namely, receiving the revenues from taxes imposed by Federal law on articles of Puerto Rico manufacture coming into the United States for consumption.

He then goes on to say:

> As pointed out above, whether taxes on articles produced in the Virgin Islands and imported into the United States should be paid into the Treasury of the Virgin Islands, is a question of policy for Congress.

There seems to be no doubt that this Department considered that Section 28 of the Revised Organic Act for the Virgin Islands was intended to provide for payments into the local treasury of, among other things, customs, duties and excise taxes collected on Virgin Islands articles shipped to the United States for sale. In a July 14, 1954 letter to the Director, Bureau of the Budget, this Department recommended that the President approve enrolled bill S. 3378 (the Revised Organic Act). In commenting on Section 28, we said the following:

> The fiscal provisions, contained in Section 28, provide first in subsection (a) that the proceeds of customs duties, United States income taxes, other taxes levied by Congress, and certain other fees shall be covered into the Islands' treasury . . . subsection (b) provides for annual determination of the amount of taxes collected under Federal internal revenue laws with respect to articles produced in the Islands and transported to the United States, and for annual payment to the Islands of a sum equal to those collections . . .

It seems clear that the "customs duties" referred to are only one of the Federal revenues among "other taxes levied by Congress" that are to be covered into the Islands' treasury. This conclusion is reinforced by the fact that the customs duties referred to in the Act of March 3, 1917, as being those collected in pursuance of that Act, are different than the customs duties referred to in the 1954 Revised Organic Act. The customs duties referred to in the latter

Act are not limited to those which might be collected under that Act, but must be fairly construed to be those collected under any Act of Congress.

Under the circumstances, the Governor of the Virgin Islands would appreciate your reassessment of the *obiter-dictum* position stated by you in the previously mentioned footnote to your November 14, 1974 letter, *supra,* which seems to affect the payment of custom duties collected on articles produced in the Virgin Islands and transported to the United States.

Sincerely yours,

MOODY R. TIDWELL III
Moody R. Tidwell III
Associate Solicitor
Division of General Law

cc: Secretary's files
Div Chron/Reading File
Terr. Subject/Reading
CBChapman, Jr. :jj:1/30/75

Supreme Court, U.S.
FILED
APR 7 198
ALEXANDER L. STEVAS
CLERK

No. 80-1253

In the Supreme Court of the United States

OCTOBER TERM, 1980

VIRGIN ISLANDS, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

ERNEST J. BROWN
DAVID ENGLISH CARMACK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 7652(b)(3) of the Internal Revenue Code of 1954 requires that the federal excise tax collected, pursuant to Sections 4081-4083 of the Code, on gasoline sold in the United States, he covered into the treasury of the Virgin Islands insofar as it is collected on the sale of gasoline refined in the Virgin Islands.

2. Whether Section 28(a) of the Revised Organic Act of the Virgin Islands requires that the customs duties collected on goods coming into the United States from the Virgin Islands be covered into the treasury of the Virgin Islands.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1253

VIRGIN ISLANDS, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. 66a-78a) is not yet officially reported. The opinions of the court of appeals (Pet. App. 1a-63a) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1980. The Court denied a timely petition for rehearing with a suggestion for rehearing en banc on December 18, 1980 (Pet. App. 96a-98a). The petition for a writ of certiorari was filed on January 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent portions of Section 28 of the Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 508, and of Sections 4081, 4082, 4083 and 7652 of the Internal Revenue Code of 1954 (26 U.S.C.), are set forth in the Appendix, *infra*, 1a-11a.

STATEMENT

In this action brought against the Secretary of the Treasury, petitioner seeks a declaratory judgment that the excise tax collected since 1966, pursuant to Sections 4081-4083 of the Internal Revenue Code of 1954 (26 U.S.C.), on the sale in the United States of gasoline refined in the Virgin Islands is to be covered into the treasury of the Virgin Islands under Section 7652(b)(3) of the Code,[1] and that the customs duties collected on articles coming into the United States from the Virgin Islands are to be covered into the treasury of the Virgin Islands under Section 28(a) of the Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 508. In addition, petitioner seeks an order compelling the Secretary to pay over these taxes and customs duties collected in the past and to be collected in the future into petitioner's treasury.[2]

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[1] Petitioner refers to Section 28(b) of the Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 508. Section 28(b) of that Act amended Section 3350 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)) by adding subsection (c) thereto. The Internal Revenue Code of 1939 was later in the same year repealed by Section 7851 of the Internal Revenue Code of 1954, and Section 7652(b)(3) of the 1954 Code succeeded Section 3350(c) of the 1939 Code.

[2] A similar claim has been made with respect to gasoline tax by Puerto Rico under Section 7652(a)(3) of the Internal

The pertinent facts are undisputed and may be summarized as follows: Since 1966, gasoline has been refined in the Virgin Islands. Some of the gasoline has been transported to the United States and sold. The sale of this gasoline was subject to a tax that has been levied since 1932 on all gasoline "sold by the producer or importer" in the United States. Revenue Act of 1932, ch. 209, Section 617, 47 Stat. 266 (now Sections 4081-4083 of the Internal Revenue Code of 1954 (26 U.S.C.)). None of the revenues derived from the tax on the sale in the United States of gasoline refined in the Virgin Islands has been covered over to the Virgin Islands (Pet. App. 26a, 28a).

United States Treasury officials have collected customs duties on items coming into the United States from the Virgin Islands to the extent that they were dutiable. These duties have always been covered into the United States Treasury (Pet. App. 2a).

In 1975, the Department of the Interior, acting at the request of petitioner's governor, asked the Department of Justice to consider whether: (1) petitioner was entitled under Section 7652(b)(3) of the Code

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Revenue Code of 1954 in *Commonwealth of Puerto Rico* v. *Blumenthal*, Nos. 79-1020, 79-1024 (D.C. Cir. Oct. 17, 1980), petition for a writ of cert. pending, No. 80-1252. In that case, Puerto Rico claims that it is entitled under Section 7652(a)(3) to the tax collected on the sale in the United States of gasoline refined in Puerto Rico. As we discuss (*infra*, pages 7-8), the controlling provision of the statute, upon which Puerto Rico relies, is in all essential respects identical to that upon which petitioner relies (Pet. App. 28a-29a). The cases were heard together in the court of appeals, and a single opinion dealt with the claims to proceeds of the tax on the sale of gasoline (Pet. App. 3a-63a). Puerto Rico makes no claim with respect to customs duties. The court of appeals dealt with the claim of the Virgin Islands to custom duties in a separate opinion (Pet. App. 1a-22a).

to the taxes on the sale in the United States of gasoline refined in the Virgin Islands; and (2) whether petitioner was entitled under Section 28(a) of the Revised Organic Act of the Virgin Islands, to the customs duties collected on dutiable goods coming into the United States from the Virgin Islands (Pet. App. 5a, 106a-110a). Petitioner had previously presented claims for the gasoline taxes and customs duties to the Secretary of the Treasury on November 18, 1974. In a letter dated October 3, 1975, the Assistant Attorney General, Office of Legal Counsel, Department of Justice, concluded that petitioner was entitled neither to the taxes on the sale in the United States of gasoline refined in the Virgin Islands nor to the customs duties collected on dutiable goods coming into the United States from the Virgin Islands (Pet. App. 5a; V.I.A. 105-111).[3]

On May 21, 1976, petitioner instituted this action in the United States District Court for the District of Columbia.[4] That court held that petitioner was entitled to the tax collected on the sale in the United States of gasoline refined in the Virgin Islands and to the customs duties collected on articles coming into the United States from the Virgin Islands.[5] The

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[3] "V.I.A." references are to the separately bound record appendix filed in the court of appeals.

[4] In the district court, the Secretary contested the jurisdiction of the court to hear this case (V.I.A. 19-20). In ruling on the merits, the district court implicitly rejected the Secretary's jurisdictional arguments.

[5] The district court, however, denied petitioner's claim for the oil import license fees imposed since 1973 by Presidential Proclamation No. 4210, 38 Fed. Reg. 9648 (1973), as amended, under Section 232(b), Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 877, as amended.

district court determined that with respect to the gasoline tax, petitioner's claim was virtually identical to the claim made by Puerto Rico in *Commonwealth of Puerto Rico* v. *Blumenthal*, and that for the reasons given in its decision in that case (Pet. App. 80a-91a), petitioner was likewise entitled to the tax collected upon the sale in the United States of gasoline refined in the Virgin Islands (Pet. App. 67a).

With respect to petitioner's claim for the customs duties, the district court held that the customs duties referred to in Section 28(a) of the Revised Organic Act included the customs duties imposed on goods coming into the United States from the Virgin Islands. As the district court saw the matter, Congress could not have referred only to the duties imposed on items coming into the Virgin Islands because they involved only insignificant amounts of revenue (Pet. App. 10a-12a, 28a-29a, 66a-75a).[6]

On appeals by both parties, the court of appeals reversed (Pet. App. 1a-63a). It held that petitioner was not entitled under Section 7652(b)(3) to the revenues from the sale in the United States of gasoline refined in the Virgin Islands, and was not entitled under Section 28(a) of the Revised Organic Act to the customs duties imposed on items coming into the United States from the Virgin Islands. The court of appeals agreed with the district court and the parties that the statute upon which the Virgin Islands relied for its claim to the taxes on the sale

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[6] The district court held against petitioner with respect to its claim for oil import license fees. In so ruling, it rejected petitioner's contention that the oil import license fees were customs duties. The district court reasoned that not all levies on imports are customs duties and that the oil import license fees served purposes fundamentally different from those underlying customs duties (Pet. App. 75a-76a).

of gasoline was in all essential aspects identical to that relied upon by Puerto Rico and had been so designed by Congress. The court concluded that the statutory phrase "produced in the Virgin Islands [Puerto Rico] and transported to the United States" referred to the events that trigger the imposition of such taxes that are to be covered into the petitioner's treasury, and that any other interpretation would lead to the absurd result of requiring the Secretary to turn over to petitioner the tax (*e.g.*, gift, estate or sales tax) on any transaction in the United States in which Virgin Islands goods are involved. The court accordingly concluded that the only taxes to be turned over to petitioner were the equalization taxes (which are imposed on items produced in the Virgin Islands and coming into the United States by Section 7652(b)(1) of the 1954 Code), and that the tax on the sale of gasoline was not an equalization tax.

With respect to the customs duties, the court of appeals ruled that Section 28 covered over only the customs duties collected by the Secretary on items coming into the Virgin Islands. As the court further noted, in the absence of Section 28(a), the customs duties collected on items coming into the Virgin Islands would have been covered into the United States Treasury. Finally, the court of appeals observed that the history of Section 28(a) with respect to customs duties showed that Congress intended to adhere to the consistent administrative practice under the prior act using the same language.

As a result of its rulings against petitioner with respect to the gasoline tax and the customs duties, the court did not address the jurisdictional issues of sovereign immunity, the tax exception to the Declaratory Judgment Act, and the statute of limitations raised by

the Secretary's appeal.[7] Moreover, the court found it unnecessary to discuss the Secretary's contention with respect to the Highway Revenue Act of 1956 (Pet. App. 1a-63a).

ARGUMENT

1. Petitioner bases its claim for the payment of the gasoline taxes collected, pursuant to Sections 4081-4083 of the Internal Revenue Code of 1954 (26 U.S.C.), on the sale in the United States of gasoline refined in the Virgin Islands on Section 7652(b)(3) of the Code (App., *infra*, 8a-10a). That Section provides, with a limitation as to the amount, for covering into petitioner's treasury taxes collected "under * * * the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States." As the parties and the courts below recognized (Pet. App. 28a-29a, 67a), a virtually identical question involving taxes on gasoline sold in the United States is involved in the *Puerto Rico* case.[8] Section 7652(b)(1), enacted originally in 1917 as Section 1000 of the Act of Oct. 3, 1917, ch. 63, 40 Stat. 325, parallels Section 7652(a)(1), enacted originally as Section 3 of the Act of Apr. 12, 1900, ch. 191, 31 Stat. 77 (commonly known as the Foraker Act).

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[7] In view of this action, we have filed a conditional cross-petition on behalf of the Secretary of the Treasury. That petition seeks review by this Court only in the event it grants the Virgin Islands' petition in this case.

[8] Indeed, petitioner has incorporated by reference the reasons given by Puerto Rico in No. 80-1252 for granting the writ of certiorari (Pet. 22 n.17). We hereby incorporate the response of the Secretary in No. 80-1252 to Puerto Rico's contentions, and are serving a copy of our response in No. 80-1252 upon counsel for the Virgin Islands.

Section 7652(b)(3), enacted originally in 1954, parallels Section 7652(a)(3). Indeed, with the exception of the limitation as to amount, Congress intended to provide the same treatment for petitioner under Section 7652(b)(3) that Puerto Rico was accorded under the provisions now embodied in Section 7652(a)(3) of the Code, App., *infra*, 7a (Pet. App. 29a).[9] For the reasons set forth in our brief in opposition in the *Puerto Rico* case, we submit that the tax on the sale of gasoline refined in the Virgin Islands is not to be covered over to the treasury of petitioner.

Petitioner contends (Pet. 22) that the provision with respect to limitation on the amount to be covered over indicates that more than simply the equalization taxes were to be covered over. But the limitation on the amount has nothing to do with determining which taxes are to be covered over. Only after it is determined which taxes are to be covered over does the provision limiting the amount come into play.[10]

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[9] See S. Rep. No. 1271, 83d Cong., 2d Sess. 4, 19, 26 (1954); *To Revise the Organic Act of the Virgin Islands: Hearings on H.R. 2644 Before the House Subcomm. on Territories and Insular Possessions*, 82d Cong., 2d Sess. 49, 87 (1952); Report to the Members of the Senate Comm. on Interior and Insular Affairs, 83d Cong., 2d Sess., *Virgin Islands Report* 17, 66-68, 73, 91-92 (Comm. Print 1954).

[10] The language quoted by petitioner (Pet. 22) from S. Rep. No. 1271, *supra*, at 4, to the effect that the internal revenue taxes to be covered over to petitioner were those "internal revenue taxes paid by mainland consumers on Virgin Islands products imported into the mainland," was not intended as an accurate description of the nature of the taxes to be covered over. See *Gurley* v. *Rhoden*, 421 U.S. 200, 206-207 (1975). Indeed, the next sentence in that report pro-

2. a. Petitioner also claims entitlement to the customs duties on articles coming into the United States from the Virgin Islands, *i.e.*, the customs duties on articles containing foreign material to the value of more than 50 per centum of their total value (Pet. App. 9a n.20). In support of its argument, petitioner invokes Section 28(a) of the Revised Organic Act of the Virgin Islands (App., *infra*, 3a-4a), which provides in pertinent part for the payment to the Virgin Islands of "[t]he proceeds of customs duties, the proceeds of the United States income tax, the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands * * *."

The court of appeals correctly recognized that unless some limitation were stated or implicit in the statute, Section 28(a) might be read to require that the proceeds of all United States customs duties and

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vides that "[t]hese revenues are primarily exicse [*sic*] taxes on Virgin Islands rum * * *." S. Rep. No. 1271, *supra*, at 4. Those taxes had been imposed under the predecessor of Section 7652(b)(1) and were to equalize the taxes imposed on the distillation of domestic rum. Those taxes were paid only indirectly by the consumers. There is no tax imposed on gasoline coming from the Virgin Islands simply because it is brought into the United States. The next paragraph of the Senate Report provided that the grant of taxes being made to petitioner was similar to the grant of taxes made to Puerto Rico. Senator Butler, who wrote the report, also sponsored S. 1014, 80th Cong., 1st Sess. (1947) (cited by the court below, Pet. App. 50a-52a). He was aware of the Treasury's position that the only taxes covered over to Puerto Rico were those taxes imposed by the predecessor of Section 7652(a)(1) and did not include taxes on the sale of items in the United States. He was also aware that the proposed legislation with respect to the Virgin Islands was to operate in parallel fashion. The Senator made no suggestion in S. Rep. No. 1271 that he was departing from the Treasury's understanding.

all income taxes collected anywhere be paid to the Virgin Islands—a reading the court properly rejected as absurd (Pet. App. 12a). Accordingly, the court properly undertook "a closer examination of Congressional intent as revealed by the structure of the statute and its legislative history" (Pet. App. 13a). After reviewing the structure of Section 28, the court of appeals recognized that the provisions for covering over taxes levied upon the inhabitants of the Virgin Islands and the various fees collected in the Virgin Islands revealed that Congress intended to cover over only those customs duties, taxes and fees that had some substantial connection with the Virgin Islands. The connection with the Virgin Islands required by Section 28(a) is the fact of collection in the Islands (Pet. App. 13a-18a). There can be no doubt that collection in the Virgin Islands is the focal point of Section 28(a). Indeed, the statutory phrase "collected in the Virgin Islands" is the only modification provided by Section 28(a).[11]

There is nothing in Section 28(a) that suggests that the customs duties that are to be paid over to the Virgin Islands are customs duties on goods coming into the United States from the Virgin Islands. Petitioner gratuitously interpolates the phrase "on goods coming into the United States from the Virgin Islands" into Section 28(a) after "customs duties." But nothing in the text of the statute supports such a variant reading. Section 28(d) of the Revised Organic Act, ch. 558, 68 Stat. 509, provides that "articles, the growth or product of, or manufactured in, such islands, from

[11] We recognize that the court of appeals found that collection in the islands to be the nexus required by reading all of Section 28 and that the phrase "collected in the Virgin Islands" in that Section does not grammatically modify "customs duties" (Pet. App. 12a-17a).

materials grown or produced in such islands or in the United States" shall enter the United States duty free, continuing the same provision in Section 3 of the Act of Mar. 3, 1917, ch. 171, 39 Stat. 1133. Only if such goods contain foreign materials to the value of more than fifty (originally, twenty) percent of total value are they dutiable in the United States. Otherwise, Section 3 of the 1917 Act and Section 28(d) of the 1954 Revised Organic Act have provided that goods coming into the United States from the Virgin Islands are subject to the same duties as like goods from foreign countries.[12] No one has suggested any reason, based on either the terms or the history of the relevant statutes, or otherwise, why customs duties on foreign, or primarily foreign, goods coming into the United States through the Virgin Islands should be remitted to the Virgin Islands.

The court of appeals correctly pointed out that the function of Section 28(a) is to insure that the customs duties collected on items entering the Virgin Islands are covered into petitioner's treasury. Customs duties have always been collected in the Virgin Islands by officials of the United States Treasury Department (Pet. App. 13a-14a n.30). Were it not for Section 28(a), those officials would be required to pay over the moneys collected on items entering the Virgin Islands into the United States Treasury. Rev. Stat., Section 3617 (31 U.S.C. 484).[13] The covering over of

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[12] This provision was designed to avoid the impact of the Insular Cases (*De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Downes* v. *Bidwell*, 182 U.S. 244 (1901)).

[13] During the years preceding the enactment of the Revised Organic Act, the customs duties on articles coming into the Virgin Islands were by no means insignificant. In the Annual Report of the Governor of the Virgin Islands to the Secretary of the Interior for the fiscal year ended June 30, 1948, page 4, the Governor indicated that the customs duties

customs on such items is all that that part of Section 28(a) is designed to accomplish.

b. The court below also correctly recognized (Pet. App. 18a-21a) that Congress was aware of the Treasury's longstanding administrative practice with respect to customs duties under prior statutes containing similar language and had not seen fit to alter the statutory language or the administrative interpretation.

The genesis of the provision in Section 28(a) of the Revised Organic Act covering over customs duties is Section 5 of the Act of Mar. 3, 1917, ch. 171, 39 Stat. 1133. Section 4 of that Act (App., *infra*, 1a-2a), had continued in force, with exceptions for goods from the United States, the existing Danish laws imposing taxes and customs duties in the Virgin Islands. Section 5, App., *infra*, 2a, then provided that "the duties and taxes collected in pursuance of this Act" were not to be covered into the general fund of the United States Treasury, but were to be used and expended for the government and benefit of the Islands.

Only 40 days after the enactment of the 1917 Act, the Comptroller of the Treasury determined on the basis of the statutory language and of its legislative history that the only duties collected under Section 5

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collected in the municipality of St. Thomas and St. John were one of three principal sources of revenue for that municipality. On the other hand, from 1936 through 1953, the receipts from passport fees rarely exceeded $200 annually in either the municipality of St. Croix or the municipality of St. Thomas and St. John. See Annual Reports of the Governor of the Virgin Islands to the Secretary of the Interior for fiscal years ended June 30, 1936, through June 30, 1953; 84 Cong. Rec. 4526 (1939). The district court's reasoning (Pet. App. 75a) that Congress could not have been concerned with the customs duities coming into the Islands simply ignores the crucial facts.

"in pursuance of this Act" were those collected in the Virgin Islands. The customs duties collected in the United States on items coming through or from the Virgin Islands were imposed under the existing general tariff law, and were only confirmed by Section 3 of the 1917 Act (23 Comp. Dec. 575 (1917); Pet. App. 6a-7a). This rationale was adopted by the Attorney General in 1926 (35 Op. Att'y Gen. 63; Pet. App. 7a) in holding that the internal revenue taxes collected on the Virgin Islands products coming into the United States were not to be turned over to the Virgin Islands under Section 5 of the 1917 Act.[14]

The function of Section 5 of the 1917 Act was embodied in Section 35 of the Organic Act of the Virgin Islands of the United States, ch. 699, 49 Stat. 1816 (commonly known as the 1936 Organic Act), which provided in pertinent part for the covering into the treasury of the Virgin Islands "the proceeds of customs duties, less the cost of collection, and the proceeds of the United States income tax, and the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands * * *." In the enactment of this provision, Congress intended to continue the "system which prevails under the existing law" (80 Cong. Rec. 6609 (1936)) and to cover over only those duties collected "within * * * its [the Virgin Islands] borders" (H.R. Rep. No. 2637, 74th Cong., 2d Sess. 3 (1936); S. Rep. No. 1974, 74th Cong., 2d Sess. 3 (1936); 80 Cong. Rec. 6609 (1936)).[15]

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[14] Petitioner agrees (Pet. 6 n.3) that the 1917 Act did not refer to the covering over of United States internal revenue taxes to the Virgin Islands.

[15] In Section 36 of the 1936 Organic Act of the Virgin Islands, ch. 699, 49 Stat. 1816, Congress imposed uniform

Beginning in 1938, bills were introduced in Congress to appropriate to petitioner the taxes collected under the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States.[16] Likewise, several bills were introduced to amend Section 3 of the Act of March 3, 1917, to increase the value of foreign materials that could be included in items coming from the Virgin Islands duty-free.[17] The purpose of increasing the number of items that could come into the United States duty-free from the Virgin Islands was to encourage the establishment of new industries in the Virgin Islands and to bring in additional revenue for the islands (S. Rep. No. 2368, 81st Cong., 2d Sess. 2 (1950)). At no time was any request made of Congress for the customs duties collected in the United States on articles coming from the Virgin Islands.[18]

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customs duties on items coming into the Virgin Islands and provided for the Secretary of the Treasury to collect them. Not until 1977 did Congress allow petitioner to alter these customs duties. Section 301(c) of Act of Oct. 15, 1977, Pub. L. No. 95-134, 91 Stat. 1163, allowed petitioner to lower, but not raise, its customs duties on articles coming into the Virgin Islands. *Trust Territory of the Pacific Islands—Appropriations: Hearing on H.R. 6550 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 47-49 (1977); S. Rep. No. 95-332, 95th Cong., 1st Sess. 11 (1977).

[16] See, *e.g.*, H.R. 10576, 75th Cong., 3d Sess. (1938), 83 Cong. Rec. 6518 (1938). We have found 19 such bills introduced in various Congresses between 1938 and 1954 (see also V.I.A. 99-100).

[17] See, *e.g.*, S. 2436, 80th Cong., 2d Sess. (1948), 94 Cong. Rec. 4007 (1948). This amendment was enacted in the Act of Sept. 7, 1950, ch. 910, 64 Stat. 784.

[18] As the court of appeals pointed out (Pet. App. 8a), in 1941, the Secretary of the Interior had requested the Attorney General to reconsider the opinion expressed in 1926 by his

Since Section 28(a) of the Revised Organic Act is virtually identical to the quoted portion of Section 35 of the 1936 Organic Act, the understanding and administrative practice with respect to the prior statute is entitled to great weight in determining the meaning of the present statute. As the court of appeals correctly pointed out (Pet. App. 18a-21a), there is absolutely nothing in the enactment of Section 28(a) that suggests any disapproval of the prior administrative practice. Indeed, the Secretary of the Interior noted that the provision with respect to covering over customs duties was "like the present organic act" (S. Rep. No. 1271, 83d Cong., 2d Sess. 15 (1954)). The same Committee Report also suggested that the only customs duties to be turned over were those that were being turned over under the 1936 Act, *i.e.*, the customs duties on items coming into the Virgin Islands (Pet. App. 21a). By adopting a new law incorporating sections of a prior law, Congress can, under these circumstances, be presumed to have knowledge of the interpretation given to the incorporated law and to have approved that construction of the reenacted provision. *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); *United States* v. *Stowe-Woodward, Inc.*, 306 F.2d 678, 680-681 (1st Cir. 1962), cert. denied, 371 U.S. 949 (1963).[19] Indeed, until this suit, pe-

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predecessor with respect to covering over the internal revenue taxes and the opinion expressed by the Comptroller General with respect to the customs duties. The Attorney General, however, adhered to the prior opinions. The Department of the Interior sought legislation with respect to the covering over of internal revenue taxes, but sought no legislation with respect to customs duties levied in the United States on items coming from the Virgin Islands.

[19] The various cases on statutory construction cited by petitioner (Pet. 20-21) do not support its position. For example, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328

titioner had not disagreed with the Secretary's interpretation.[20] In supporting an application in 1966 by the Hess Oil Company for an oil import allocation for the importation of petroleum from the Virgin Islands into the United States, one of the benefits that petitioner's governor stated would accrue to the United States from granting this allocation was the customs duties (as much as $6,000,000) to be paid into the United States Treasury (V.I.A. 73, 77).

Petitioner's contention (Pet. 18-19) that the court of appeals did not consider Section 28 of the Revised Organic Act in its legislative context is not correct. To the contrary, the court of appeals found that the Secretary's interpretation was supported by the scheme of the statute, the legislative history, and the longstanding administrative construction. Con-

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U.S. 275 (1946), does not deal with congressional approval of prior administrative construction of reenacted language. By its own terms, *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978), does not apply where the statutory language is, as petitioner admits (Pet. 17-18), ambiguous. Further, this case does not involve an erroneous administrative construction. In order to make its argument, petitioner has simply ignored the 1936 Organic Act, from which the language of the current statute was drawn, and has further ignored the fact that the Treasury has been responsible for the collection and covering over of customs duties.

[20] Petitioner errs in contending (Pet. 20) that it was without power to bring this action before it had an elected governor. As early as 1962, the Attorney General of the Virgin Islands was accorded the power and duty to represent the executive branch of the government of the Virgin Islands in civil proceedings in which the government had an interest. V.I. Code Ann. tit. 3, § 114(a)(1) (1967). In suggesting that the Attorney General of the Virgin Islands could have brought this suit, we do not mean to suggest that the district court then or now had jurisdiction to entertain the suit.

trary to petitioner's suggestion (Pet. 20), the fact that the Revised Organic Act was to become a new basic charter of government does not undermine the relevance of the virtually identical prior statute and the administrative construction of it by the Treasury.

3. Contrary to petitioner's final claim (Pet. 16), the decision below has not required it to seek additional funds from Congress. Congress has, by statute, provided the Virgin Islands with revenue sources from, among others, customs duties on goods coming into the Islands and from income taxes on individuals and corporations located in the Virgin Islands.[21] Congress has also from time to time made a variety of specific grants and general appropriations to the Islands.[22] The local government may not amend federal

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[21] In the Act of July 12, 1921, ch. 44, 42 Stat. 123, Congress provided:

> That the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds of such taxes shall be paid into the treasuries of said islands.

The effect of this provision was to create a separate income tax structure for the Virgin Islands largely mirroring the provisions of the federal income tax laws. It was felt that turning over income tax revenues to the Virgin Islands was consistent with the prior treatment whereby Congress "allowed them to use the revenues they collect for the support of their government." 61 Cong. Rec. 3137 (1921).

[22] See, *e.g.*, approximately $3,000,000 in the Second Supplemental Appropriations Act, 1975, Pub. L. No. 94-32, 89 Stat. 177; $8,500,000 in the Supplemental Appropriations Act, 1977, Pub. L. No. 95-26, 91 Stat. 72 (see also Section 4, Act of Aug. 19, 1976, Pub. L. No. 94-392, 90 Stat. 1195); $14,000,000 in the Second Supplemental Appropriations Act, 1978, Pub. L. No. 95-355, 92 Stat. 527 (see also Section 402 of the Act

tax laws, may, since 1977, lower but not raise customs duties, and can and does rebate amounts of taxes and customs duties to businesses in the Islands. In fiscal 1978, petitioner received approximately $238 million under these federal laws, including $157 million from customs duties on goods coming into the Islands. But after allowing rebates or subsidies to local businesses in the amount of $175 million, the net yield to the local government was only $62 million.[23] There is little reason why customs duties on essentially foreign goods coming into the United States through the Virgin Islands should be covered over to petitioner to enable it to continue the fiscal policies outlined in the Report of the Secretary of the Interior. If petitioner had retained more of the amounts that Congress had provided for it, there would have been less need for the funds it seeks to gain through litigation. Congress has indeed been generous to petitioner in providing it with funds for its fiscal independence. However, it never intended petitioner to have the funds it seeks in this suit.

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of Oct. 15, 1977, Pub. L. No. 95-134, 91 Stat. 1163). For some specific grants, see U.S. Department of the Interior, Office of Territorial Affairs, *The Economy of the U.S. Virgin Islands* 75 (June 20, 1979).

[23] See Report of the Secretary of the Interior to the Speaker of the House of Representatives, dated June 29, 1979, at 3, as required by Section 4(d) of the Act of Aug. 18, 1978, Pub. L. No. 95-348, 92 Stat. 491, and attached Report, dated June 1979, of the United States Comptroller for the Virgin Islands, to the Secretary of the Interior, at 2, 16-17.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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APPENDIX

Act of Mar. 3, 1917, ch. 171, 39 Stat. 1132 *et seq.*:

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Sec. 3. That on and after the passage of this Act there shall be levied, collected, and paid upon all articles coming into the United States or its possessions, from the West Indian Islands ceded to the United States by Denmark, the rates of duty and internal-revenue taxes which are required to be levied, collected, and paid upon like articles imported from foreign countries: *Provided*, That all articles, the growth or product of, or manufactured in such islands from materials the growth or product of such islands or of the United States, or of both, or which do not contain foreign materials to the value of more than twenty per centum of their total value, upon which no drawback of customs duties has been allowed therein, coming into the United States from such islands shall hereafter be admitted free of duty.

Sec. 4. That until Congress shall otherwise provide all laws now imposing taxes in the said West Indian Islands, including the customs laws and regulations, shall, in so far as compatible with the changed sovereignty and not otherwise herein provided, continue in force and effect, except that articles the growth, product, or manufacture of the United States shall be admitted there free of duty: *Provided*, That upon exportation of sugar to any foreign country, or the shipment thereof to the United States or any of its possessions, there shall be levied, collected, and paid thereon an export duty of $8 per ton of

two thousand pounds irrespective of polariscope test, in lieu of any export tax now required by law.

Sec. 5. That the duties and taxes collected in pursuance of this Act shall not be covered into the general fund of the Treasury of the United States, but shall be used and expended for the government and benefit of said islands under such rules and regulations as the President may prescribe.

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Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 497 *et seq.*:

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Sec. 8. (a) The legislative authority and power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands, but no law shall be enacted which would impair rights existing or arising by virtue of any treaty or international agreement entered into by the United States, nor shall the lands or other property of nonresidents be taxed at a higher rate than the lands or other property of residents.

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(c) The laws of the United States applicable to the Virgin Islands on the date of approval of this Act, including laws made applicable to the Virgin Islands by or pursuant to the provisions of the Act of June 22, 1936 (49 Stat. 1807), and all local laws and ordinances in force in the Virgin Islands, or any part thereof, on the date of approval of this Act shall, to the extent they are not inconsistent with this Act,

continue in force and effect until otherwise provided by the Congress: *Provided*, That the legislature shall have power, when within its jurisdiction and not inconsistent with the other provisions of this Act, to amend, alter, modify, or repeal any local law or ordinance, public or private, civil or criminal, continued in force and effect by this Act, except as herein otherwise provided, and to enact new laws not inconsistent with any law of the United States applicable to the Virgin Islands, subject to the power of Congress to annul any such Act of the legislature.

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Sec. 28. (a) The proceeds of customs duties, the proceeds of the United States income tax, the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands, less the cost of collecting all of said duties, taxes, and fees, shall be covered into the treasury of the Virgin Islands, and shall be available for expenditures as the Legislature of the Virgin Islands may provide: *Provided*, That the term "inhabitants of the Virgin Islands" as used in this section shall include all persons whose permanent residence is in the Virgin Islands, and such persons shall satisfy their income tax obligations under applicable taxing statutes of the United States by paying their tax on income derived from all sources both within and outside the Virgin Islands into the treasury of the Virgin Islands: *Provided further*, That nothing in this Act shall be construed

to apply to any tax specified in section 3811 of the Internal Revenue Code.

(b) Subchapter B of chapter 28 of the Internal Revenue Code is amended by adding to section 3350 thereof the following subsection:

"(c) *Disposition of Internal Revenue Collections.*—Beginning with the fiscal year ending June 30, 1954, and annually thereafter, the Secretary of the Treasury shall determine the amount of all taxes imposed by, and collected during the fiscal year under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States. The amount so determined less 1 per centum and less the estimated amount of refunds or credits shall be subject to disposition as follows:

"(i) There shall be transferred and paid over to the government of the Virgin Islands from the amounts so determined a sum equal to the total amount of the revenue collected by the government of the Virgin Islands during the fiscal year, as certified by the Government Comptroller of the Virgin Islands. The moneys so transferred and paid over shall constitute a separate fund in the treasury of the Virgin Islands and may be expended as the legislature may determine: *Provided*, that the approval of the President or his designated representative shall be obtained before such moneys may be obligated or expended."

* * * * *

(d) There shall be levied, collected, and paid upon all articles coming into the United States or its possessions from the Virgin Islands the

rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries, and the internal revenue taxes imposed by section 3350 of title 26, United States Code: *Provided*, That all articles, the growth or product of, or manufactured in, such islands, from materials grown or produced in such islands or in the United States, or both, or which do not contain foreign materials to the value of more than 50 per centum of their total value, upon which no drawback of custom duties has been allowed therein, coming into the United States from such islands shall be admitted free of duty. In determining whether such a Virgin Islands article contains foreign material to the value of more than 50 per centum, no material shall be considered foreign which, at the time the Virgin Islands article is entered, or withdrawn from warehouse, for consumption, may be imported into the continental United States free of duty generally.

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Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 4081. IMPOSITION OF TAX.

(a) *In general.* [as amended by Section 201(b), Federal-Aid Highway Act of 1961, Pub. L. No. 87-61, 75 Stat. 123]—There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon.

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SEC. 4082. DEFINITIONS.

(a) *Producer.* [as amended by section 201(e)(1), Federal-Aid Highway Act of 1959, Pub.

L. No. 86-342, 73 Stat. 615]—As used in this subpart, the term "producer" includes a refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer. Any person to whom gasoline is sold tax-free under this subpart shall be considered the producer of such gasoline.

* * * * *

(c) *Certain uses defined as sales.* [as amended by Section 205(c)(6), Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 242]—If a producer or importer uses (otherwise than in the production of gasoline or of special fuels referred to in section 4041) gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this chapter be considered a sale.

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SEC. 4083. [as amended by Section 1906(b)(13)(A), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1834] EXEMPTION OF SALES TO PRODUCER.

Under regulations prescribed by the Secretary the tax imposed by section 4081 shall not apply in the case of sales of gasoline to a producer of gasoline.

SEC. 7652. SHIPMENTS TO THE UNITED STATES.

(a) *Puerto Rico.*—

(1) *Rate of tax.* [as amended by Section 204(17), Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, 72 Stat. 1430]—Except as provided in section 5314, articles of merchandise of Puerto Rican

manufacture coming into the United States and withdrawn for consumption or sale shall be subject to a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture.

(2) *Payment of tax.* [as amended by Section 1906(b)(13)(A), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1834]—The Secretary shall by regulations prescribe the mode and time for payment and collection of the tax described in paragraph (1), including any discretionary method described in section 6302(b) and (c). Such regulations shall authorize the payment of such tax before shipment from Puerto Rico, and the provisions of section 7651(2)(B) shall be applicable to the payment and collection of such tax in Puerto Rico.

(3) *Deposit of internal revenue collections.* [as amended by Section 808(b)(3), Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, 79 Stat. 164]—All taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States (less the estimated amount necessary for payment of refunds and drawbacks), or consumed in the island, shall be covered into the treasury of Puerto Rico.

(b) *Virgin Islands.*—

(1) *Taxes imposed in the United States.* [as amended by Section 204(18), Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, 72 Stat. 1430]—Except

as provided in section 5314, there shall be imposed in the United States, upon articles coming into the United States from the Virgin Islands, a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture.

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(3) *Disposition of internal revenue collections.* [as amended by Section 10(a), Act of Jan. 2, 1976, Pub. L. No. 94-202, 89 Stat. 1141, and Sections 1906(a)(55), 1906(b)(13)(A), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1832, 1834]—Beginning with the calendar quarter ending September 30, 1975, and quarterly thereafter, the Secretary shall determine the amount of all taxes imposed by, and collected during the quarter under, the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United States. The amount so determined less 1 percent and less the estimated amount of refunds or credits shall be subject to disposition as follows:

(A) There shall be transferred and paid over, as soon as practicable after the close of the quarter, to the Government of the Virgin Islands from the amounts so determined a sum equal to the total amount of the revenue collected by the Government of the Virgin Islands during the quarter, as certified by the Government Comptroller of the Virgin Islands. The moneys so transferred and paid over shall con-

stitute a separate fund in the treasury of the Virgin Islands and may be expended as the legislature may determine: *Provided,* That the approval of the President or his designated representative shall be obtained before such moneys may be obligated or expended.

(B) Any amounts remaining shall be deposited in the Treasury of the United States as miscellaneous receipts.

If at the end of any fiscal year the total of the Federal contribution made under subparagraph (A) with respect to the four calendar quarters immediately preceding the beginning of that fiscal year has not been obligated or expended for an approved purpose, the balance shall continue available for expenditure during any succeeding fiscal year, but only for emergency relief purposes and essential public projects, with the prior approval of the President or his designated representative. The aggregate amount of moneys available for expenditure for emergency relief purposes and essential public projects only shall not exceed the sum of $5,000,000 at the end of any fiscal year. Any unobligated or unexpended balance of the Federal contribution remaining at the end of a fiscal year which would cause the moneys available for emergency relief purposes and essential public projects only to exceed the sum of $5,000,000 shall thereupon be transferred and paid over to the Treasury of the United States as miscellaneous receipts.

Organic Act of the Virgin Islands of the United States, ch. 699, 49 Stat. 1807 *et seq.*:

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Sec. 35. All taxes, duties, fees, and public revenues collected in the municipality of Saint Croix shall be covered into the treasury of the Virgin Islands and held in account for said municipality and all taxes, duties, fees, and public revenues collected in the municipality of Saint Thomas and Saint John shall be covered into said treasury of the Virgin Islands and held in account for said municipality: *Provided*, That the proceeds of customs duties, less the cost of collection, and the proceeds of the United States income tax, and the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands shall be covered into the treasury of the Virgin Islands and held in account for the respective municipalities, and shall be expended for the benefit and government of said municipalities in accordance with the annual municipal budgets. The Municipal Council of Saint Croix may make appropriations for the purposes of said municipality from, and to be paid out of, the funds credited to its account in the treasury of the Virgin Islands; and the Municipal Council of Saint Thomas and Saint John may make appropriations for the purposes of said municipality from, and to be paid out of, the funds credited to its account in said treasury.

Sec. 36. Taxes and assessments on property and incomes, internal-revenue taxes, license fees, and service fees may be imposed and collected, and royalties for franchises, privileges, and con-

cessions granted may be collected for the purposes of the Government of the Virgin Islands as may be provided and defined by the municipal councils herein established: *Provided,* That all money hereafter derived from any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury of the Virgin Islands and paid out for such purpose only, except when otherwise authorized by the legislative authority having jurisdiction after the purpose for which such fund was created has been accomplished. Until Congress shall otherwise provide, all laws concerning import duties and customs in the municipality of Saint Thomas and Saint John now in effect shall be in force and effect in and for the Virgin Islands: *Provided,* That the Secretary of the Treasury shall designate the several ports and sub-ports of entry in the Virgin Islands of the United States and shall make such rules and regulations and appoint such officers and employees as he may deem necessary for the administration of the customs laws in the Virgin Islands of the United States; and he shall fix the compensation of all such officers and employees and provide for the payment of such compensations and other expenses of the collection of duties, fees, and taxes imposed under the customs laws from the receipts thereof. The export duties in effect on the date of enactment of this Act may be from time to time reduced, repealed, or restored by ordinance of the municipal council having jurisdiction: *Provided further,* That no new export duties shall be levied in the Virgin Islands except by the Congress.

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